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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

CENTAURI SHIPPING LTD.,

Petitioner,

—v.—

WESTERN BULK CARRIERS KS, WESTERN BULK AS,
and WESTERN BULK CARRIERS AS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

KIRK M. LYONS
Counsel of Record
LYONS & FLOOD LLP
65 West 36th Street, 7th Floor
New York, New York 10018
(212) 594-2400

RAYMOND G. MULLADY, JR.
ORRICK, HERRINGTON
& SUTCLIFFE LLP
Columbia Center
1152 15th Street, N.W.
Washington, D.C. 20005
(202) 339-8400

Counsel for Petitioner Centauri Shipping Ltd.

August 28, 2009

QUESTION PRESENTED

Whether a foreign corporation's registration to conduct business in the State of New York is sufficient, by itself, for it to be "found within the district" under Rule B(1) of the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions, and avoid "maritime attachment"?

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b), the following list identifies all of the parties appearing here and before the United States Court of Appeals for the Second Circuit.

The petitioner here, and appellant below, is Centauri Shipping Ltd.

The appellees below, and respondents here, are Western Bulk Carriers KS, Western Bulk AS, and Western Bulk Carriers AS.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, petitioner states as follows:

Centauri Shipping Ltd. is not a publicly held corporation in the United States and there are no corporate parents, subsidiaries, or affiliates of Centauri Shipping Ltd. which are otherwise publicly held in the United States.

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 2009 U.S. App. LEXIS 8464, and is reprinted in the Appendix to the Petition ("Pet. App.") at 1a-3a. The Court of Appeals' decision was based entirely on its prior opinion in *STX Panocean (UK) Co., Ltd. v. Glory Wealth Shipping Pte Ltd.*, which is reported at 560 F.3d 127, and which is reprinted at Pet. App. 4a-17a. The Court of Appeals' order denying rehearing and rehearing en banc is unpublished, but reprinted at Pet. App. 47a-48a. The District Court's vacatur of the attachment occurred during a September 7, 2007, hearing which was not reported, but was subsequently memorialized in an Order dated September 12, 2007 ("Vacatur Order"), and discussed in an opinion reported at 528 F. Supp. 2d 186. The Vacatur Order and the subsequent opinion are reprinted at Pet. App. 18a-46a.

JURISDICTION

The Court of Appeals entered its judgment on April 20, 2009. A timely filed petition for rehearing and rehearing en banc was denied on July 10, 2009. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Rule B(1) of the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions:

> Rule B. In Personam Actions: Attachment and Garnishment
>
> (1) When Available; Complaint, Affidavit, Judicial Authorization, and Process. In an in

personam action:

> (a) If a defendant is not found within the district when a verified complaint praying for attachment and the affidavit required by Rule B(1)(b) are filed, a verified complaint may contain a prayer for process to attach the defendant's tangible or intangible personal property--up to the amount sued for--in the hands of garnishees named in the process.
>
> (b) The plaintiff or the plaintiff's attorney must sign and file with the complaint an affidavit stating that, to the affiant's knowledge, or on information and belief, the defendant cannot be found within the district. The court must review the complaint and affidavit and, if the conditions of this Rule B appear to exist, enter an order so stating and authorizing process of attachment and garnishment. The clerk may issue supplemental process enforcing the court's order upon application without further court order.
>
> (c) If the plaintiff or the plaintiff's attorney certifies that exigent circumstances make court review impracticable, the clerk must issue the summons and process of attachment and garnishment. The plaintiff has the burden in any post-attachment hearing under Rule E(4)(f) to show that

exigent circumstances existed.

(d) (i) If the property is a vessel or tangible property on board a vessel, the summons, process, and any supplemental process must be delivered to the marshal for service.

(ii) If the property is other tangible or intangible property, the summons, process, and any supplemental process must be delivered to a person or organization authorized to serve it, who may be (A) a marshal; (B) someone under contract with the United States; (C) someone specially appointed by the court for that purpose; or, (D) in an action brought by the United States, any officer or employee of the United States.

(e) The plaintiff may. invoke state-law remedies under Rule 64 for seizure of person or property for the purpose of securing satisfaction of the judgment.

New York's Business Corporation Law § 1304:

R § 1304. Application for authority; contents

(a) A foreign corporation may apply for authority to do business in this state. An application, entitled 'Application for authority of . . .. (name of corporation) under

section 1304 of the Business Corporation Law", shall be signed and [fig 1] delivered to the department of state. It shall set forth:

(1) The name of the foreign corporation.

(2) The fictitious name the corporation agrees to use in this state pursuant to section 1301 of this chapter, if applicable.

(3) The jurisdiction and date of its incorporation.

(4) [fig 1] The purpose or purposes for which it is formed, it being sufficient to state, either alone or with other purposes, that the purpose of the corporation is to engage in any lawful act or activity for which corporations may be organized under this chapter, provided that it also state that it is not formed to engage in any act or activity requiring the consent or approval of any state official, department, board, agency or other body without such consent or approval first being obtained. By such statement all lawful acts and activities shall be within the purposes of the corporation, except for express limitations therein or in this chapter, if any.

(5) The [fig 1] county within this state in which its office is to be located.

(6) A designation of the secretary of state

as its agent upon whom process against it may be served and the post office address within or without this state to which the secretary of state shall mail a copy of any process against it served upon him.

(7) If it is to have a registered agent, his name and address within this state and a statement that the registered agent is to be its agent upon whom process against it may be served.

(8) A statement that the foreign corporation has not since its incorporation or since the date its authority to do business in this state was last surrendered, engaged in any activity in this state, except as set forth in paragraph (b) of section 1301 (Authorization of foreign corporations), or in lieu thereof the consent of the state tax commission to the filing of the application, which consent shall be attached thereto.

(b) Attached to the application for authority shall be a certificate by an authorized officer of the jurisdiction of its incorporation that the foreign corporation is an existing corporation. If such certificate is in a foreign language, a translation thereof under oath of the translator shall be attached thereto.

New York's Civil Practice Law and Rules Section 301:

> § 301. Jurisdiction over persons, property or status
>
> A court may exercise such jurisdiction over persons, property, or status as might have been exercised heretofore.

The pertinent provisions are also reproduced at Pet. App. 49a-56a.

STATEMENT OF THE CASE

The question presented by this case is one of exceptional importance to the global maritime community. At stake is the continued viability of the remedy of maritime attachment, a unique feature of American admiralty practice which permits plaintiffs possessing maritime claims to restrain the property of defendants on the strength of an *ex parte* showing that the defendants cannot be "found within the district."

This vital tool has been rendered useless by the Second Circuit's resort to a state corporate registration statute when determining whether the requirements necessary to obtain a maritime attachment have been met. In so doing, a vast loophole in the remedy has been opened, through which feckless maritime defendants can be rendered

immune from attachment simply by filing sham registrations to do business which permit them to be "found within the district" without having an actual presence.

The danger is clear and real. In the wake of the Second Circuit's decision below, foreign maritime operators are registering to do business in New York in droves. Their objective is to create an effective safe harbor from maritime attachment and avoid the only practical means by which claimants can obtain jurisdiction or security for their claims.

This is a problem of national and international scope and importance. Due to New York's prominence as a center of international funds transfers, decisions impacting the ability of plaintiffs to obtain maritime attachments in New York directly affect their ability to restrain such funds transfers nationally. As a result, the Second Circuit's decisions regarding the scope and requirements of maritime attachment are of critical importance to the global maritime community. Given its preeminence in this area, and the deference given to its decisions in this field by other Circuits, the Second Circuit is in effect, a "Federal Circuit" for maritime attachments. The issues involved, and the consequences flowing from this case are no less important than the patent issues which this Court frequently reviews.

Moreover, this case presents direct conflicts with the traditional historical purposes of maritime attachment as outlined by this Court, as well as the

principles of harmony and uniformity of federal maritime law prescribed by this Court.

Thus, the Court must grant certiorari in order to ensure the preservation of the remedy of maritime attachment and its uniform application, which are essential to the healthy flow of international commerce and to thousands of maritime plaintiffs worldwide who depend on it to obtain security for their claims and jurisdiction over peripatetic maritime defendants.

A. Factual Background

This case began in March of 2005, in Luanda, Angola, when the M/V CENTAURI, a vessel owned by petitioner Centauri Shipping, Ltd. ("Centauri"), was wrongfully arrested by respondent Western Bulk Carriers KS ("WBC"). WBC had arrested the vessel in an attempt to collect on English judgments that it had obtained against a third-party, Navitrans Maritime Inc. Joint Appendix A-80 – A-81.[1] Since the English judgments in question were against a third-party, Centauri challenged the arrest, and in November of 2006, obtained a judgment from the Supreme Court of the Republic of Angola ("Angolan Supreme Court") finding that WBC had wrongfully arrested the vessel.

In fact, the Angolan Supreme Court also subjected WBC to a fine for its "malicious abuse of

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[1] All citations to record evidence are to materials in the Joint Appendix ("JA") that was before the Second Circuit.

legal process" finding that WBC had acted in bad faith by intentionally filing misleading documents with the lower court when seeking the arrest of Centauri's vessel. JA A-112. Emboldened by this outcome, Centauri commenced proceedings to recover $14,693,577 in damages for the loss of income (and other expenses) it suffered through having had its vessel under arrest for nearly two years. JA A-180 – A-183. These proceedings remain on-going in Angola.

B. Proceedings Below

In the interim, in order to ensure that it would be able to collect on any judgment it obtained from the Angolan Supreme Court, Centauri filed a maritime attachment action against WBC in the District Court. Pet. App. 22a; JA A-8 – A-15. Centauri's goal was to obtain an Ex Parte Order For Process of Maritime Attachment and Garnishment ("Attachment Order") under Rule B of the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions ("Rule B") that could be served on intermediary banks in the Southern District of New York that process U.S. dollar denominated electronic funds transfers. In this way, Centauri could obtain pre-judgment security for its claims by having these banks restrain any electronic funds transfers being sent to or from WBC.

Obtaining a maritime attachment is a fairly simple procedure. A plaintiff need only file a verified

complaint stating a maritime claim, and support it with an affidavit "stating that, to the affiant's knowledge, or on information and belief, the defendant cannot be found within the district." Supp. R. Adm. or Mar. Cl. & Asset Forfeiture Actions B(1)(b). If, upon review, the verified complaint and affidavit appear to be in order, the court must authorize the issuance of process of attachment and garnishment. *Id.*

Upon obtaining such process of attachment and garnishment, a plaintiff may serve it on any garnishees in the district holding the defendant's tangible or intangible property including – in New York only – electronic funds transfers. Supp. R. Adm. or Mar. Cl. & Asset Forfeiture Actions B(1)(d). The garnishees, which in the case of electronic funds transfers, are the major intermediary banks located in Manhattan, must subsequently restrain any funds transfers emanating from, or being sent for the benefit of, the defendant, as pre-judgment security for plaintiff's claims.

Importantly, this restraint of property also provides a basis for the court's assertion of *quasi in rem* jurisdiction over the defendant, and in essence, acts to motivate the defendant to appear and answer the plaintiff's claims, or else forfeit the seized property.

The entire procedure is conducted on an *ex parte* basis, although the defendant has the right to a prompt hearing after property has been attached in

order to challenge the basis on which the process of maritime attachment and garnishment was issued or to seek other relief from the attachment. Supp. R. Adm. or Mar. Cl. & Asset Forfeiture Actions E(4)(f).

Thus, the remedy grants broad power to plaintiffs to assist them in securing and prosecuting their claims, and its exercise is restricted only by the requirement that the defendants not be "found within the district." Despite various permutations in its wording and application over the centuries, this requirement that the defendant not be capable of being "found within the district" has always been

present in Rule B and its predecessors.[2]

The purpose of this presence requirement is plain: to force maritime defendants to either elect to subject themselves to the jurisdiction of the courts of

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[2] *See, e.g.*, Francis Clerke, PRAXIS SUPREMAE CURIAE ADMIRALITATIS (1666), translated in John E. Hall, THE PRACTICE AND JURISDICTION OF THE COURT OF ADMIRALTY: IN THREE PARTS, p. 60 (Baltimore 1809) ("if [the defendant] has concealed himself or has absconded from the kingdom, so that he cannot be arrested..."); Arthur Browne, A COMPENDIOUS VIEW OF THE CIVIL LAW AND OF THE LAW OF THE ADMIRALTY, VOL. II, at p. 434 (2nd ed. 1802) ("suppose that a person ... cannot be found, or that he lives in a foreign country: here the ancient proceedings of the admiralty court provided an easy and salutary remedy ... [t]he goods of the party were attached to compel his appearance."); R. of Prac. of the Cts. of the U.S. in Causes of Adm. & Mar. Jurisdiction, Rule 2, 44 U.S. (3 How.) at iii (1844) ("suits in personam the mesne process may be by a ... warrant of arrest of the person of the defendant, with a clause therein that if he cannot be found to attach his goods and chattels to the amount sued for..."); R. of Prac. for the Cts. of the U.S. in Adm. & Mar. Jurisdiction, Rule 2, 254 U.S. 671 (1920) ("suits in personam the mesne process ... the libellant may ... pray for ... a clause therein to attach his goods and chattels ... if said respondent shall not be found within the district."); Supplemental Rules for Certain Admiralty and Maritime Claims, Rule B, 383 U.S. 1071 (1966) ("With respect to any admiralty or maritime claim in personam a verified complaint may contain a prayer for process to attach the defendant's goods and chattels, or credits and effects in the hands of garnishees named in the complaint to the amount sued for, if the defendant shall not be found within the district."); *See generally*, William Tetley, *Arrest, Attachment, and Related Maritime Law Procedures*, 73 TUL. L. REV. 1895, 1900-1903 (1999).

the district in question through the conduct of business, or run the risk that their property in the district will be attached. By preventing maritime attachment of the property of defendants who were actually present in the district, the remedy is thus saved for use only in cases where there is truly no other means by which a plaintiff can readily obtain redress.

Within a matter of days of obtaining its Attachment Order, Centauri was able to restrain $15,350,796 in electronic funds transfers being sent to or from WBC. Pet. App. 23a; JA A-16 – A-21. In order to free up the attached funds transfers, WBC provided a surety bond as alternate security. Pet. App. 23a; JA A-20 – A-21.

However, subsequently WBC moved to vacate the attachment and dismiss Centauri's action pursuant to Supplemental Rule E(4), on the grounds (in part) that no Attachment Order should have been issued because it could have been "found within the district." Pet. App. 23a; JA A-22 – A-23.

Rule B itself does not define "found within the district."[3] Accordingly, the District Court applied the "two-pronged inquiry" established by the Second Circuit in *Seawind Compania, S.A. v. Crescent Line, Inc.*, 320 F.2d 580, 581-82 (2d Cir. 1963): "First, whether (the respondent) can be found within the district in terms of jurisdiction, and second, if so,

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[3] *See* Notes of Advisory Committee to 1966 adoption of Rule B: Note to Subdivision (1).

whether it can be found for service of process."

In essence, under the *Seawind* test a defendant will be deemed to be not "found within the district" unless it can establish that personal jurisdiction can be asserted over it, and it also possesses an agent within the district on whom service of process can be made. The *Seawind* test also requires the application of state law to determine these findings under the *Erie* doctrine.

Under New York case law, a foreign corporation must be engaged in a continuous and systematic course of "doing business" in New York in order to be subject to personal jurisdiction. *See, e.g., Frummer v. Hilton Hotels International, Inc.*, 19 N.Y.2d 533 (1967); NY C.P.L.R. § 301.

WBC conceded that it did not conduct sufficiently continuous and systematic business in New York to be subject to personal jurisdiction under New York's case law, but nevertheless maintained that it could be "found within the district," by virtue of the fact that it had filed an application for authority to conduct business with the New York Department of State's Division of Corporations pursuant to N.Y. Bus. Corp. Law § 1304, and therefore had "consented" to the personal jurisdiction of the courts in New York. This "consent," in conjunction with its appointment of its maritime attorneys as its agent for the service of process in the district, WBC urged, rendered it capable of being "found within the district" and therefore, it should not have been

subject to maritime attachment.

The requirements for a foreign corporation to register to do business in New York are exceedingly low. All that is needed is for the foreign corporation to submit to the Department of State a brief application for authority, along with a copy of a certificate of good standing and payment of a modest fee. N.Y. Bus. Corp. Law § 1304. Within a few business days the foreign corporation will be registered, without having to establish that the foreign corporation actually does, or ever will, conduct any business in New York.

Nevertheless, after the case was reassigned to a different judge, WBC's motion was granted in an oral decision given on the record, and the Attachment Order was vacated. Pet. App. 24a; JA A-235 – A-254. Centauri timely appealed the District Court's decision (pursuant to 28 U.S.C. § 1291) and also moved for a stay of the decision pending the appeal. Pet. App. 24a-25a; JA A-257 – A-259, A-262. Although the District Court initially denied Centauri's request for a stay, Centauri was able to obtain a stay pending appeal from the Second Circuit. Pet. App. 45a-46a; JA A-270, A-272 – A-273.

On March 19, 2009, the Second Circuit, Per Curiam, issued an opinion in *STX Panocean (UK) Co., Ltd. v. Glory Wealth Shipping Pte Ltd.*, 560 F.3d 127 (2d Cir. 2009), in which the same issue had been raised. In the *STX Panocean* opinion, the Second Circuit stated:

> We find that registration with the New York Department of State, pursuant to New York Business Corporation Law § 1304, to conduct business in New York and designation of an agent within the district upon whom process may be served constitutes being "found" within the district for purposes of Rule B of the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions.

Pet. App. 5a-6a.

This conclusion by the Second Circuit was predicated on its finding that "[i]t is well-settled under New York law that registration under § 1304 subjects foreign companies to personal jurisdiction in New York." Pet. App. 11a-12a.[4]

On April 20, 2009, the Second Circuit issued a Summary Order affirming the District Court's decision, stating that since the issue presented on

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[4] Since deciding *Int'l Shoe Co. v. Wash.*, 326 U.S. 310 (1945), this Court has never directly addressed the issue of whether a foreign corporation's registration to do business, standing alone, would constitute sufficient minimum contacts to permit a state to assert personal jurisdiction over that foreign corporation either. But *see Neirbo Co. v. Bethleham Shipbuilding Corp.*, 308 U.S. 165, 175 (1939) (holding that the predecessor to New York's corporate registration statute was constitutional in the limited context of determining whether the statutory designation of an agent for service of process could constitute a waiver of applicable federal statutory venue requirements).

appeal was whether WBC's registration to conduct business in New York pursuant to N.Y. Bus. Corp. Law § 1304 was sufficient for that corporation to be "found within the district" under Rule B(1), thereby defeating attachment of the corporation's property, "[w]e are bound by STX [supra] unless and until its rationale is overruled by the Supreme Court or by this court en banc." Pet. App. 3a.

On May 4, 2009, Centauri timely filed a Petition for Rehearing *En Banc*, which was denied by the Second Circuit in an Order dated July 10, 2009. Pet. App. 47a-48a. On July 17, 2009, Centauri moved to stay the issuance of the mandate by the Second Circuit pending the filing of a petition for writ of certiorari in the Supreme Court. The motion for a stay from the Second Circuit remains pending.

REASONS FOR GRANTING THE PETITION

This case presents an exceptionally important question concerning an essential remedy of American admiralty law: should state law be permitted to supplant federal maritime law in determining whether a defendant can be "found within the district" and therefore, subject to maritime attachment? This question should be, but has not yet been, decided by this Court.

Maritime attachment is an ancient remedy, whose origins are "to be found in the remotest history of the civil as well as of the common law." *Atkins v. The Disintegrating Co.*, 85 U.S. (18 Wall.) 272, 303 (1874). Its durability can be credited to the uniquely

international nature of the maritime industry, and the propensity maritime debtors and tortfeasors had (and continue to have) for evading plaintiffs through the secreting of assets, use of corporate shells, flags of convenience, and offshore tax havens. Through its provision of an expedient means for the restraint of a maritime defendant's property, Rule B attachment facilitates maritime commerce in innumerable ways by encouraging parties to do business with the confidence that a distant debtor can be made to answer and pay a claim.

The remedy of maritime attachment is more important than ever. With the advent and widespread adoption of electronic funds transfer technologies in recent years, maritime attachment has only become more prominent, surpassing vessel arrests to become the chief means by which plaintiffs seek to secure their admiralty claims. This is understandable since it has become exceedingly common for maritime operators today to have little or no fixed assets except for streams of electronic funds transfers.

The confluence of New York's position as a central clearing house for these electronic funds transfers, and the global maritime community's virtually exclusive preference for such funds transfers as a method of payment, has led to the Second Circuit becoming a *de facto* "Federal Circuit" for maritime

attachments.[5]

As a result, the Second Circuit's decisions concerning the meaning and application of Rule B's provisions have almost uniformly been adopted throughout the country. Thus, decisions issued by the Second Circuit which impair the right to obtain maritime attachments, such as the one below, have an immediate and far reaching effect on international maritime commerce.

The Second Circuit's decision below threatens the continued viability of maritime attachment, through its reference to a state corporate registration statute to determine whether a defendant can be "found within the district" for the purposes of Rule B. The resort to state law eviscerates this most quintessential of maritime remedies because it drastically lowers the requirements defendants must meet to obtain immunity from maritime attachment.

In essence, it creates a loophole, which is rapidly being exploited, whereby maritime operators

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[5] *See, e.g., Anchor Marine Transp. Ltd. v. Lonestar 203*, 2009 U.S. Dist. LEXIS 29281, at *4 n.1 (W.D. La. Mar. 18, 2009) (applying non-binding Second Circuit law because of "long history of maritime attachments in the courts of the Second Circuit due to the commercial importance of the ports of New York"); Ian Taylor, Note, *The Final Chapter? The Second Circuit Once Again Addresses Rule B Attachments of Electronic Fund Transfers in Consub Delaware LLC v. Schahin Engenharia Limitada*, 33 TUL. MAR. L. J. 575, 586-86 (2009) (observing that "cases involving Rule B attachments on EFTs are unique to the Second Circuit, and even more specifically, to the Southern District of New York.")

throughout the world – regardless of their lack of any actual connections with New York – can render their international funds transfers immune from attachment simply by filing sham registrations to do business in New York and appointing a statutory agent for the service of process in Manhattan.

This is a clear subversion of the original purpose of the presence requirement for maritime attachments, which was to confront maritime defendants with the option of either subjecting themselves to the jurisdiction of the courts of the district in question through the conduct of business, or to make themselves vulnerable to the possibility that their property in the district would be attached. By giving defendants an easy escape from this dilemma, the Second Circuit has effectively neutered the ability of plaintiffs worldwide to attach electronic funds transfers, and thus, obtain security and jurisdiction for their maritime claims.

Thus, the Second Circuit's decision flies in the face of prior decisions of this Court recognizing the importance of maritime attachment and its vital historical purposes. *See, e.g., Manro v. Almeida*, 23 U.S. (10 Wheat.) 473, 490 (1825); *Atkins v. The Disintegrating Co.*, 85 U.S. (18 Wall.) 272 (1874); *In re Louisville Underwriters*, 134 U.S. 488, 490 (1890); *Swift & Co. Packers v. Compania Colombiana Del Caribe*, 339 U.S. 684, 693, 698 (1950).

Further, by relying on state law, the Second Circuit's decision is in conflict with this Court's long

line of precedent concerning the invalidity of state legislation which "works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations." *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 216 (1917).

Allowing incompatible state corporate registration statutes to play a role in determining whether the requirements for obtaining a maritime attachment have been met would subject the maritime industry to multiple standards making it commercially burdensome for maritime commerce to operate efficiently. This federal interest in maintaining the uniformity and harmony of maritime law supplants any conflicting state interest, especially since the Constitution allocates substantive and procedural admiralty law to federal, not state, control, and the Supplemental Admiralty Rules represent a federal enactment defining the unique procedures applicable in cases that fall within admiralty jurisdiction.

Thus, the Court must grant certiorari to fashion a rule consistent with the historical purpose and role of maritime procedural rules, and to prevent the default to inapplicable and potentially inconsistent state law that would disrupt the uniformity necessary to the smooth functioning of maritime commerce.

I. THIS CASE RAISES ISSUES OF NATIONAL AND INTERNATIONAL IMPORTANCE AND SCOPE

Historically, maritime operators were a shifty sort, prone to hiding assets, evading judgments, and registering their corporate shells and vessels in unfriendly and secretive offshore jurisdictions. *Trans-Asiatic Oil Ltd., S.A. v. Apex Oil Co.*, 743 F.2d 956, 961 (1st Cir. 1984) (noting that "the [maritime] creditor ... may more often be the one in need of special protections.") Little has changed today. *See Schiffahartsgesellschaft Leonhardt & Co. v. A. Bottacchi S.A. de Navegacion*, 732 F.2d 1543, 1548 (11th Cir. 1984) (noting that "Merchants were long ago described as 'shrewd, careful, familiar with the forms of business ... watchful [of] their own interests'" and "[l]ittle has changed today.")

In fact, due to the development and wholesale adoption of electronic funds transfer technologies in recent years by the international maritime community, the situation faced by maritime plaintiffs is probably worse than it has ever been. The spread of these technologies is such that virtually all payments in maritime commerce made today are effected by international funds transfers. *Winter Storm Shipping v. TPI*, 310 F.3d 263, 273 (2d Cir. 2002) (noting that "[t]he use of EFTs, product of the modern electronic age, is widespread in international trade.") This ability to easily and instantly transfer assets from one jurisdiction to another has only heightened the tendencies of

maritime operators to shirk legal responsibility. *See, e.g., Polar Shipping, Ltd. v. Oriental Shipping Corp.*, 680 F.2d 627, 637 (9th Cir. 1982) (observing that "[i]n this electronic age, freights owing to a charterer ... can be transferred instanter ... to a non-maritime haven.")

As a result, today many maritime operators are virtually judgment proof, with their beneficial owners hidden behind a Matryoshka doll of corporate shells, registered in jurisdictions that are unfriendly to creditors, and possessing no assets but a transient stream of electronic funds transfers. *See, e.g., Inter-American Shipping Enterprises, Ltd. v. Turbine Tanker TULA*, 1982 AMC 951 (E.D.Va. 1981) (describing the corporate shells used by maritime debtors to disguise shipping assets and the difficulties of a recovery in the face of such measures).

With such odds stacked against them, plaintiffs are loath to pursue claims against maritime defendants absent some reassurance that there will be assets against which a judgment or award can be enforced. Thus, the use of devices such as vessel arrests and maritime attachments is vital to preserving the rights of plaintiffs to pursue their claims and obtain meaningful relief.

Due to technical requirements and certain banking regulations, as well as New York's status as one of the financial and trade capitals of the world, virtually all of the U.S. denominated electronic funds

transfers being sent worldwide pass through intermediary banks located in Manhattan as part of their processing en route to their final destination.[6]

Therefore, since Rule B only permits the attachment of property located within the district in which the remedy is sought, the only effective forum for a plaintiff seeking to attach U.S. dollar denominated electronic funds transfers is the United States District Court for the Southern District of New York. As a result of this unusual situation, the Southern District of New York has been virtually inundated with a flood a maritime attachment proceedings, and by far, leads the nation in such

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[6] *See Winter Storm*, 310 F.3d at 273 (citing *Reibor Int'l, Ltd. v. Cargo Carriers (KACZ-CO.), Ltd.*, 759 F.2d 262, 266 (2d Cir. 1985) for the proposition that "Banking networks serving global commerce tend to use intermediary banks in the world's financial capitals such as New York" ... "Often, when a person in one foreign country makes a payment in U.S. dollars to someone in another foreign country, the payment clears through New York."); *Swiss Marine Servs. S.A. v. Louis Dreyfus Energy Servs. L.P.*, 598 F. Supp. 2d 414, 415 (S.D.N.Y. 2008) (noting that "[b]ecause banking networks handling international commerce tend to use intermediary banks, and New York is a global financial capital, many of the EFTs pass through banks in [the Southern District of New York].")

filings by a wide margin.[7]

Given its role as a gatekeeper to the attachment of electronic funds transfers, the Southern District of New York is of extreme importance to maritime plaintiffs worldwide. Imagine a vessel owner seeking to recover against a charterer who breached the terms of the charter. Absent the ability to restrain the charterer's electronic funds transfers, and the likely absence of any other locatable assets, the owner will likely never be able to recover on its claims, and cognizant of that fact, the charterer will feel free to breach the charter party at will. The situation just described occurs all too frequently and will only continue to worsen as maritime operators flock to New York to file sham registrations.

However, the national character of the issues raised by this case are not limited to the Southern District of New York's unusual position. Even before the advent of electronic funds transfers, decisions issued by the Second Circuit regarding the application of Rule B were almost universally adopted throughout the nation. For example, all of

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[7] For example, according to one researcher, between October 1, 2008, and January 31, 2009, nearly 1,000 maritime attachment proceedings (seeking to attach an estimated $1.35 billion in the aggregate) were filed in the Southern District of New York, constituting approximately one-third of all civil lawsuits filed in that district. *See Amicus Curiae* brief submitted by The Clearing House Association L.L.C. in *Consub Del. LLC v. Schahin Engenharia Limitada*, 543 F.3d 104 (2d Cir. 2008), at pp. 3-4.

the Courts of Appeals which have considered the issue, have essentially adopted the Second Circuit's *Seawind* test for determining when a defendant cannot be "found within the district."[8]

Thus, due to its prominence, the Second Circuit's decisions regarding Rule B, such as the one below, will have a strong national impact on maritime commerce which must be addressed by this Court in order to ensure the unfettered flow of international trade.

II. THE DECISION BELOW IS IN SUBSTANTIAL TENSION WITH THIS COURT'S PRIOR DECISIONS

This Court has never delineated precisely how the presence requirement of the remedy of maritime attachment should be evaluated, and furthermore, has not heard a case involving maritime attachment in over fifty years. Thus, there is no direct conflict between the holding of the Second Circuit below and

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[8] *See, e.g., Navieros Inter-Americanos, S.A. v. M/V Vasilia Express*, 120 F.3d 304 (1st Cir. 1997) (adopting the immediate predecessor to the *Seawind* test); *La Banca v. Ostermunchner*, 664 F.2d 65, 67-68 (5th Cir. 1981) (adopting *Seawind* test); *Oregon by State Highway Comm'n v. Tug Go Getter*, 398 F.2d 873, 874 (9th Cir. 1968) (same); *Maritrans Operating Partners L.P. v. M/V Balsa 37*, 64 F.3d 150, 153-154 (4th Cir. 1995), *cert. denied*, 516 U.S. 1073 (1996) (interpreting a local admiralty rule which specifically provided that "[a] defendant is considered to be 'not found within the district' if, in an action in personam, the defendant cannot be served with the summons and complaint as provided in Federal Rule 4(d).")

this Court's prior decisions.

However, there is a palpable tension between the results created by the Second Circuit's decision and the general respect and deference granted by this Court to the traditional historical purposes of maritime attachment.

Further, the Second Circuit's reference to state law and state statutes in determining the boundaries of a federal admiralty rule, places it at odds with the principles stated by this Court favoring uniformity and harmony in the application of federal maritime law.

Due to the national and international interests implicated by the Second Circuit's decision, this Court should grant certiorari to address these important issues.

A. There is a Conflict With the Traditional Historical Purposes of Maritime Attachment

It has long been recognized that maritime attachment is one of the most distinguishing features of American admiralty practice. This Court has noted that use of maritime attachment by admiralty courts "has prevailed during a period extending as far back as the authentic history of those tribunals can be traced." *Atkins v. The Disintegrating Co.*, 85 U.S. (18 Wall.) 272 (1874); *see also In re Louisville Underwriters*, 134 U.S. 488, 490 (1890) (observing that maritime attachment "has been recognized and upheld by the rules and decisions of this court" as

well as by "the ancient and settled practice of courts of admiralty"); *see generally*, Matthew P. Harrington, *ARTICLE: The Legacy of the Colonial Vice-Admiralty Courts (Part II)*, 27 J. MAR. L. & COM. 323, 350-51 (1996).

Its necessity and utility for the smooth functioning of maritime commerce have also been praised. *See, e.g., Manro v. Almeida*, 23 U.S. (10 Wheat.) 473, 490 (1825) (stating of "the practice of issuing attachments" that "it has the highest sanction also, as well in principle as convenience"); *Swift & Co. Packers v. Compania Colombiana Del Caribe*, 339 U.S. 684, 698 (1950) ("[t]he importance of the right to proceed by attachment to afford security has been emphasized"); *Schiffahartsgesellschaft*, 732 F.2d at 1548 (noting that maritime attachment "commands a speedy clarification of vital facts underlying both prior disputes and the current seizure" and "compels adjudication" and remarking that the absence of the remedy "would in many cases amount to a denial of justice.")

In reaching its decision in *STX Panocean*, the Second Circuit explicitly rejected this Court's recognition of the special needs of maritime plaintiffs. In fact, the Second Circuit perversely justified its holding by explaining that: "[i]n the modern era, although maritime commerce is still international and maritime assets are still transitory, companies that have both appointed an agent for service of process and registered in New York, consenting to jurisdiction, do not pose the same

needs for maritime attachment." Pet. App. 15a. Rather, in such circumstances, the Second Circuit continued, "there are generally any number of means to prosecute a civil claim and, upon receiving judgment, collect on that claim." *Id.*

This reference to "any number of means to ... collect on that claim" is nothing but a nostrum, since in many cases, a maritime defendant has no property or other assets except for a stream of electronic funds transfers, which cannot be restrained except by resort to the unique remedy of maritime attachment. (See POINT I, *supra*). Moreover, through its off-handed dismissal of the need for security in light of the jurisdiction obtained through registration, the Second Circuit has improperly favored one purpose of maritime attachment (obtaining jurisdiction over a maritime defendant) over the other purpose (obtaining security).

Through its disregard of the useful and necessary role played by maritime attachment in modern admiralty practice, the Second Circuit's decision below and in *STX Panocean* has betrayed maritime plaintiffs worldwide, and is thereby in stark contrast with this Court's declared allegiance and deference towards the historical practice.

B. There is a Conflict With the Principle Favoring Uniformity and Harmony in the Application of Federal Maritime Law

This Court has long held that permitting state law to control, or even influence, the meaning of

terms used is a maritime procedural rule is forbidden by the Constitution. U.S. CONST. art. III, § 1, § 2, cl. 2; U.S. CONST. art. I, § 8, cl. 3.

The Constitution, in establishing a basis for maritime jurisdiction, "took from the States all power, by legislation or judicial decision, to contravene the essential purposes of, or to work material injury to, characteristic features of such law or to interfere with its proper harmony and uniformity in its international and interstate relations." *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 160 (1920). The purpose of the Framers in doing so, was "[t]o preserve adequate harmony and appropriate uniform rules relating to maritime matters and bring them within control of the Federal Government...." *Id.* In other words, the intent was "to place the entire subject -- its substantive as well as its procedural features -- under national control because of its intimate relation to navigation and to interstate and foreign commerce." *Panama R.R. Co. v. Johnson*, 264 U.S. 375, 386 (1924).

Throughout its history, this Court has continued to reaffirm this principle. As early as 1875, this Court stated that it was "unquestionable" that the Constitution's extension of federal judicial power "to all Cases of admiralty and maritime Jurisdiction":

> ... must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the

> intention to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states.

The Lottawanna, 88 U.S. (21 Wall.) 558, 575 (1875). This principle was re-affirmed by this Court in *American Dredging Co. v. Miller*, 510 U.S. 443, 451 (1994), and again most recently in *Norfolk Southern Ry. v. James N. Kirby, Pty Ltd.*, 543 U.S. 14, 28 (2004).

See also S. Pac. Co. v. Jensen, 244 U.S. 205 (1917) (rejecting New York State workers' compensation statute as impairing the uniformity of maritime law); *Chelentis v. Luckenbach S.S. Co.*, 247 U.S. 372 (1918) (declining to permit a seaman to apply state law providing for greater damages in his personal injury action against his employer); *Kossick v. United Fruit Co.*, 365 U.S. 731 (1961) (refusing to apply New York's Statute of Frauds to seaman's breach of contract claim, since federal law, supreme by virtue of U.S. CONST. art. VI, carried with it the implication that wherever a maritime interest was involved, that interest displaced a local interest no matter how significant); and *see generally*, *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 244 n. 10 (1942) (noting that "[i]n many other cases this Court has

declared the necessary dominance of admiralty principles in actions in vindication of rights arising from admiralty law"), and *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199, 210 (1996) (observing that "in several contexts, we have recognized that vindication of maritime policies demanded uniform adherence to a federal rule of decision, with no leeway for variation or supplementation by state law") (both collecting cases).

Accordingly, under the long-standing principles outlined by this Court, state legislation is invalid if it "works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations." *S. Pac. Co.*, 244 U.S. at 216. *See also* Edwin D. Dickinson & William S. Andrews, Jr., *A Decade of Admiralty in the Supreme Court of the United States*, 36 CALIF. L. REV. 169 (1948) (describing the uniformity requirement as an elliptical description of the maritime laws' essential insulation from the diverse and parochial tendencies of the local laws of the several states.)

There can be no question that maritime attachment is one of the characteristic features of maritime law, like arrest, salvage, general average, and personification of the vessel. *See, e.g., U.S. Express Lines, Ltd. v. Higgins*, 281 F.3d 383, 391 (3rd Cir. 2002) ("the area of maritime attachments [is] a subject of particular concern to the federal courts, and one where national uniformity is of some

importance.")

There also can be no question that the application of state corporate registration statutes works a material prejudice to the characteristic features of this maritime remedy, since it provides a loophole for defendants to escape the effects of maritime attachment contrary to its historical purposes. Therefore, it is clear that such state statutes must yield to this venerable aspect of maritime procedure.

The failure to maintain uniformity invites inconsistent results which subvert the "traditional commercial maritime interests' need for decisional stability." Michael F. Vitt, *Stemming the Tide: Uniformity in Admiralty Law*, 28 U. BALT. L. REV. 423, 444 (1999). Commentators have noted that national rules in the form of the general maritime law are necessary "to subject an industry to a single standard when the imposition of multiple standards would make it commercially burdensome for maritime commerce to operate efficiently." Robert Force, *Choice of Law in Admiralty Cases: "National Interests" and the Admiralty Clause*, 75 TUL. L. REV. 1421, 1482 (2001). "Confusion and inefficiency will inevitably result if more than one body of law governs" the parties' rights. *Norfolk Southern Ry.*, 543 U.S. at 29. "[L]eaving the functional usefulness of Rule B attachments to the vagaries of the laws of the fifty states would create a measure of anarchy ... inconsistent with an ancient purpose of admiralty law ... [and] detrimental to international commerce." *Aurora Maritime Co. v. Abdullah Mohamed Fahem &*

Co., 85 F.3d 44, 48-49 (2d Cir. 1996).

Thus, the Constitution and the concomitant uniformity doctrine require that the Federal courts fashion a uniform maritime rule, not resort to state law. For example, state property rights have been held to yield to the rights granted by maritime law. *See, e.g., Aurora Maritime*, 85 F.3d at 47 (bank's state-law right of set-off was inferior and had to yield to maritime plaintiff's right to security under Rule B); *In Re Sterling Nav. Co., Ltd. v. Sterling Nav. Co. Ltd. A/S*, 31 B.R. 619 (S.D.N.Y. 1983) (reversing bankruptcy court's award and holding that shipowner had enforceable lien even though it was not filed in accordance with UCC Article 9 because maritime liens were independent of UCC and have priority over trustee's lien in bankruptcy).

The Supremacy Clause, U.S. CONST. art. VI, grants Congress the power to preempt state legislative and common law. *See, e.g., Pub. Utils. Comm'n of State of California v. United States*, 355 U.S. 534, 544 (1958). When Congress authorized the Supreme Court to develop admiralty rules in 1792, it reiterated the peculiar nature of maritime law and instructed the Supreme Court to adhere to rules and usages of admiralty rather than those of the common law courts. *Amstar Corp. v. S/S ALEXANDROS T.*, 664 F.2d 904, 908 (4th Cir. 1981). It has been held that "Rule B is a sterling example of the Court's respect for that advice." *Schiffahartsgesellschaft*, 732 F.2d at 1547.

Furthermore, Rule B was promulgated by this Court under the authority of the Rules Enabling Act of 1934 which specifically granted this Court the power "to prescribe, by general rules, for the district courts of the United States ... the practice and procedure in civil actions at law" and provides that "thereafter all laws in conflict therewith shall be of no further force or effect." Thus, this statute contains a direct and unambiguous preemption clause, under which any state legislation which conflicts with or restricts federal procedural rules prescribed by this Court is rendered ineffective.

The Admiralty Rules, including Rule B, are therefore a necessary feature of the federal procedural rules adopted pursuant to the Rules Enabling Act of 1934, and to the extent that Rule B conflicts with state law, such as New York's Business Corporation Law § 1304, the latter can be of no force or effect.

New York's Business Corporation Law § 1304 is in direct conflict with Rule B because it acts to prohibit the federal courts from exercising powers conferred on them by Rule B. First, it prohibits the court from issuing attachments against defendant who are amenable to the jurisdiction of the court but not actually present in the district. Impairing a federal court's procedural powers in this fashion is impermissible:

As this Court explained in *Hanna v. Plumer*, 380 U.S. 460, 473-74 (1965): "[t]o hold that a Federal

Rule of Civil Procedure must cease to function whenever it alters the mode of enforcing state-created rights would be to disembowel either the Constitution's grant of power over federal procedure or Congress' attempt to exercise that power in the Enabling Act." Such a topsy-turvy result is especially pernicious in admiralty, where the rules occupy a distinctively important role in the federal procedural system.

This unique stature of the Supplemental Rules arises from maritime commerce's international character and the mobility of vessels, so that "the [maritime] creditor ... may more often be the one in need of special protections." *Trans-Asiatic Oil*, 743 F.2d at 961. Such special circumstances make it all the more inappropriate to superimpose state law to decide the reach and functioning of the Supplemental Rules.

Congress has preempted state law that would impair the effectiveness of federal procedural rules. "The legacy of admiralty's legal heritage is the deep rooted historical basis surrounding its procedural rules." *Schiffahartsgesellschaft*, 732 F.2d at 1547. The distinctively federal character of the Supplemental Rules makes it all the more important to accord them preemptive effect over any state law that would impair their operation. *See generally* Lizabeth L. Burrell, *SYMPOSIUM: Federalism and Uniformity in Maritime Law: Application of State Law to Maritime Claims: Is There a Better Guide Than Southern Pacific Co. v. Jensen?*, 21 TUL. MAR.

L. J. 53 (1996) (strongly urging in favor of uniformity and cataloging the dangers of reliance on state law in the place of federal general maritime law.)

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

KIRK M. LYONS *
LYONS & FLOOD LLP
65 West 36th Street
7th Floor
New York, NY 10018
(212) 594-2400

RAYMOND G. MULLADY, JR.
ORRICK, HERRINGTON & SUTCLIFFE LLP
Columbia Center
1152 15th Street, N.W.
Washington, D.C. 20005
(202) 339-8400

Counsel for Petitioner Centauri Shipping Ltd.

August 28, 2009

* *Counsel of Record*

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LEXSEE 2009 U.S. APP. LEXIS 8464

Centauri Shipping Ltd., Plaintiff-Appellant, -v.- Western Bulk Carriers KS, Western Bulk AS, Western Bulk Carriers AS, Defendants-Appellees.

07-4193-cv

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

323 Fed. Appx. 36; 2009 U.S. App. LEXIS 8464

April 20, 2009, Decided

NOTICE: PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

PRIOR HISTORY: *Centauri Shipping Ltd. v. Western Bulk Carriers KS, 528 F. Supp. 2d 197, 2007 U.S. Dist. LEXIS 83134 (S.D.N.Y., 2007)*

COUNSEL: [*1] For Appellant: Kirk M. Lyons (Jon Werner, on the brief), Lyons & Flood LLP, New York, NY.

For Appellee: Patrick F. Lennon, Lennon, Murphy & Lennon, LLC, New York, NY.

JUDGES: PRESENT: HON. CHESTER J. STRAUB, HON. SONIA SOTOMAYOR, HON. DEBRA ANN LIVINGSTON, Circuit Judges.

OPINION

SUMMARY ORDER

UPON DUE CONSIDERATION, it is hereby ORDERED, ADJUDGED AND DECREED that the judgment of the district court is AFFIRMED.

Plaintiff-Appellant Centauri Shipping Ltd. appeals from the September 12, 2007 judgment of the United States District Court for the Southern District of New York (Sullivan, J.) vacating the attachment of appellee Western Bulk Carriers KS's property. We assume the parties' familiarity with the underlying facts and procedural history of the case.

The only issue presented by this appeal is whether Western Bulk Carrier KS's registration to conduct business in New York pursuant to *New York Business Corporation Law § 1304* is sufficient for that corporation to be "found within the district" under *Rule B(1) of the Supplemental Rules* for Admiralty or Maritime Claims and Asset Forfeiture Actions, thereby defeating attachment of the corporation's property. This Court recently decided the issue in the affirmative. [*2] *See STX Panocean*

(UK) Co. v. Glory Wealth Shipping PTE Ltd., 560 F.3d 127, 133 (2d Cir. 2009) (per curiam).

When ordered to submit additional briefing on the question of whether and how *STX* affected its appeal, Centauri failed to distinguish its case from *STX*, and instead urged us to reconsider the holding of *STX*. We are bound by *STX* unless and until its rationale is overruled by the Supreme Court or by this court *en banc*. *See State Employees Bargaining Agent Coal. v. Rowland, 494 F.3d 71, 86 (2d Cir. 2007)*.

We have reviewed appellant's remaining arguments and find them to be without merit. For the foregoing reasons, we AFFIRM the judgment of the district court.

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LEXSEE 560 F.3D 127

STX PANOCEAN (UK) CO., LTD., Plaintiff-Appellant, - v.- GLORY WEALTH SHIPPING PTE LTD. AND GLORY WEALTH SHIPPING SERVICES LTD. OF BVI, Defendants-Appellees.

Docket No. 08-6131-cv

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

560 F.3d 127; 2009 U.S. App. LEXIS 5751; 2009 AMC 748

February 13, 2009, Argued
March 19, 2009, Decided

SUBSEQUENT HISTORY: As Amended March 27, 2009.

PRIOR HISTORY: [1]**

Motion seeking a stay pursuant to *Federal Rule of Appellate Procedure 8(a)*, and appeal of the December 10, 2008 order of the United States District Court for the Southern District of New York (Daniels, J.),

vacating the ex parte Process of Maritime Attachment and Garnishment obtained by Plaintiff-Appellant.

DISPOSITION: THE MOTION IS DISMISSED AS MOOT AND THE DISTRICT COURT ORDER IS AFFIRMED.

COUNSEL: CHRISTOPHER CARLSEN, Clyde and Co. U.S. LLP, New York, NY, for Plaintiff-Appellant.

JAMES H. POWER, (Lisa D. Schaupp on the brief), Holland & Knight, LLP, New York, NY, for Defendants-Appellees.

JUDGES: Before: WALKER, CALABRESI, and WESLEY, Circuit Judges.

OPINION

[*128] PER CURIAM:

Plaintiff-Appellant STX Panocean (UK) Co., Ltd. ("STX") appeals from and seeks a stay, pursuant to *Federal Rule of Appellate Procedure 8(a)*, of the December 10, 2008 order of the United States District Court for the Southern District of New York (Daniels, J.) vacating the *ex parte* Process of Maritime Attachment and Garnishment obtained by STX in the amount of $ 900,000 against Glory Wealth Shipping Pte Ltd. ("Glory Wealth") and Glory Wealth Shipping Service Ltd. ("Glory Service") (collectively, the "Defendants"). We find that registration with the New York Department **[**2]** of State, pursuant to *New York Business Corporation*

Law § 1304, to conduct business in New York, and designation of an agent within the district upon whom process may be served constitutes being "found" within the district for purposes of *Rule B of the Supplemental Rules* for Admiralty or Maritime Claims and Asset Forfeiture Actions. We therefore affirm the district court's vacatur of the maritime attachment and dismiss the motion for a stay as moot.

BACKGROUND

In November 2008, STX filed a complaint against Defendants, alleging that **[*129]** Glory Wealth agreed to charter one of its vessels, but then failed to produce the required hire payment for a fifteen-day period, and that Glory Service served as guarantor of Glory Wealth's performance. The district court issued an *ex parte* order pursuant to *Rule B of the Supplemental Rules for Admiralty of Maritime Claims and Asset Forfeiture Actions* granting an attachment against Glory Wealth in the amount of $ 900,000. *See STX Panocean (UK) Co., Ltd. v. Glory Wealth Shipping Pte Ltd.*, No. 08-CV-9762 (GBD) (S.D.N.Y. Nov. 13, 2008) (*Ex Parte* Order).

The Defendants responded with a letter motion to vacate the attachment. The Defendants argued that they were not subject to a Rule **[**3]** B attachment because they had registered with the New York Department of State and therefore could be "found" in New York for Rule B purposes.

On December 10, 2008, the district court conducted a hearing to assess whether Glory Wealth in fact met Rule B's requirements. At the conclusion of the hearing, the district court vacated the

attachment, finding that "[i]n the absence of a clear statement by the Second Circuit to the contrary," the court agreed with the sizable majority of Southern District judges who concluded "that the requirements [for a finding that the defendant is] found in this district are not a set of greater requirements than [those required to exercise] personal jurisdiction over the defendant[s] in this case." *Id.* (Hr'g Tr.) 27. The district court also noted that if STX won an arbitration award, it could return to the Southern District to satisfy that judgment against the Defendants. *Id.* at 28. STX reiterated its request for a stay of the vacatur pending the outcome of the appeal before this Court of *Centauri Shipping Ltd. v. W. Bulk Carriers KS, 528 F. Supp. 2d 186 (S.D.N.Y. 2007), appeal docketed*, No. 07-4193-cv (2d Cir. Sept. 18, 2007). The district court denied **[**4]** the application. *Id.* at 29-30. The district court explained that "the balance of hardships doesn't weigh towards a stay" where the attachment affected a significant amount of funds that were intended to flow to other parties. *STX Panocean*, No. 08-CV-9762 (Hr'g Tr.) 29-30. The district court added that "there's no reason to believe that, if appropriate, future funds can't be attached in further support of an arbitration award," particularly where it was unclear whether STX had even filed for arbitration. *Id.* at 30. On December 16, 2008, STX filed a timely notice of appeal.

On December 18, 2008, STX filed a motion for a stay of execution of the order vacating the attachment. The applications judge granted a temporary stay pending this Court's hearing of that motion.

Because this is an issue of frequent occurrence in this circuit, *see, e.g., Marimed Shipping, Inc. v. Persian Gulf Shipping Co., 567 F. Supp. 2d 524 (S.D.N.Y. 2008); Pioneer Navigation Ltd. v. Stx Pan Ocean (U.K.) Co., 08 Civ. 10490 (JGK), 2008 U.S. Dist. LEXIS 103255; Minmetals Shipping & Forwarding Co. v. HBC Hamburg Bulk Carriers GmbH & Co., No. 08 Civ. 3533 (RWS), 2008 U.S. Dist. LEXIS 48639 (S.D.N.Y. Jun. 24, 2008); Carolina Shipping, Ltd. v. Renaissance Ins. Group, No. 08 Civ 4711 (BSJ), 2008 U.S. Dist. LEXIS 104432 (S.D.N.Y. Jun. 10, 2008),* **[**5]** *appeal docketed,* No. 08-3142-cv (2d Cir. Jun. 24, 2008); *Centauri, 528 F. Supp. 2d at 186,* and disposition of the motion requires analysis of the merits of the underlying appeal, we consolidated the motion and underlying appeal to resolve the merits of plaintiff's claim for an attachment. The parties were instructed to brief the substance of the appeal as well as the motion.

[*130] DISCUSSION

This Court, in its discretion, may issue a stay pending appeal under Rule B(1) of the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions. A factor to be considered in granting a stay is whether the movant has demonstrated "a strong showing that he is likely to succeed on the merits." *McCue v. City of New York (In re World Trade Ctr. Disaster Site Litig.), 503 F.3d 167, 170 (2d Cir. 2007).* In our view, STX cannot demonstrate any likelihood of success on the merits.

Rule B provides, in relevant part: "If a defendant is not found within the district . . . a verified

complaint may contain a prayer for process to attach the defendant's tangible or intangible personal property--up to the amount [**6] sued for--in the hands of garnishees named in the process." *Fed. R. Civ. P. Supp. R. B(1)(a).* STX argues that Defendant's registration pursuant to *§ 1304* alone is insufficient to avoid attachment in the Southern District of New York. However, for the following reasons, we find that registration under the statute is sufficient--defendants who have registered with the Department of State pursuant to *§ 1304* may be "found" within the district for purposes of Rule B analysis. [1]

> 1 We note that there has been some disagreement among district court judges as to the meaning of the term "district." However, this issue is not before us as the parties both agree that the district in question in this case is the Southern District of New York.

Maritime attachments arose because it is often more difficult to obtain jurisdiction over parties to a maritime dispute than parties to a traditional civil action. Maritime parties are itinerant, their assets transitory. *See In re Louisville Underwriters, 134 U.S. 488, 493, 10 S. Ct. 587, 33 L. Ed. 991 (1890).* Thus, the traditional policy underlying maritime attachment has been to permit the attachment of assets wherever they can be found, thereby obviating the need for a plaintiff to "scour [**7] the globe" to find a proper forum for suit, or property of the defendant sufficient to satisfy a judgment. *Aqua Stoli Shipping Ltd. v. Gardner Smith Pty Ltd., 460 F.3d 434, 443 (2d Cir. 2006).*

As such, an attachment under *Admiralty Rule B* serves two purposes. The attachment establishes jurisdiction over a portion of a defendant's property and thereby creates a fund from which a judgment may be satisfied. *See Seawind Compania, S.A. v. Crescent Line, Inc., 320 F.2d 580, 581-82 (2d Cir. 1963)*. However, this Court has stated that "[t]he two purposes may not be separated . . . for security cannot be obtained except as an adjunct to obtaining jurisdiction." *Id. at 582*. Thus, Rule B gives potential defendants the choice between subjecting themselves to the jurisdiction of the courts of the district in question, or making themselves vulnerable to the possibility that their property in the district will be attached. *See Daehan Shipping Co., Ltd. v. Farenco Shipping Co., Ltd., No. 08 Civ. 10052, 2008 U.S. Dist. LEXIS 104433, 2008 WL 5068962, at *1 (S.D.N.Y. Nov. 24, 2008)*.

Although *Rule B* does not expressly define "found within the district," this Court has interpreted it to require "a two-pronged inquiry: first, whether [Defendants] **[**8]** can be found within the district in terms of jurisdiction, and second, if so, whether [they] can be found for service of process." (the "*Seawind* Test"). *Seawind, 320 F.2d at 582* (internal citations and quotation marks omitted); *see also Integrated Container Serv. Inc. v. Starlines Container Shipping Ltd., 476 F. Supp. 119, 122 (S.D.N.Y. 1979)* (stating that "[a] maritime **[*131]** attachment is precluded under [Rule B] only if the defendants have engaged in sufficient activity in the district or the cause of action has sufficient contacts with the district to permit the court to exercise in personam jurisdiction over the defendants," and the defendant "can be found within the geographical confines of the

district for service of process."). While the purpose of the prongs cannot be separated, they are distinct: the presence of an agent authorized to accept process is, alone, insufficient to establish that a defendant is "found" within that district. *See Seawind, 320 F.2d at 583*. Similarly, sufficient contacts to establish in personam jurisdiction in the *International Shoe* sense, absent a showing of actual presence that would allow a plaintiff to locate the defendant in the district for service **[**9]** of process, will not support a conclusion that a defendant is found within that district. *Id. at 583-84*; *see also Integrated Container, 476 F. Supp. at 122*.

Federal law defines the requirements necessary for satisfaction of *Rule B*; however, federal courts look to the relevant state law to determine if those requirements are met. Therefore, we look to New York law to determine whether the Defendants can be found within the Southern District. *See, e.g., Seawind, 320 F.2d at 583* (looking to state law governing service of process and personal jurisdiction to analyze whether the defendant was found within the Southern District).

It is undisputed that Defendants in this case satisfy the second prong of the *Seawind* Test, as both parties agree that Defendants have designated an in-state agent to receive service of process in the district at issue. *See STX Panocean*, No. 08 CV 9762, (Hr'g Tr.) 7. Therefore, we need only address the first prong of the test: whether Defendants are subject to personal jurisdiction in the district.

It is well-settled under New York law that registration under *§ 1304* subjects foreign companies to personal jurisdiction in New York. *See, e.g.,*

Augsbury Corp. v. Petrokey Corp., 97 A.D.2d 173, 470 N.Y.S.2d 787 (3d Dep't 1983); [**10] *Robfogel Mill-Andrews Corp. v. Cupples Co., Mfrs., 67 Misc. 2d 623, 624, 323 N.Y.S.2d 381 (N.Y. Sup. Ct., Monroe Cty. 1971)*. Federal courts have applied this doctrine as well. *See, e.g., Iyalla v. TRT Holdings, Inc., No. 04 Civ. 8114 (NRB), 2005 U.S. Dist. LEXIS 14913, 2005 WL 1765707, at *3 (S.D.N.Y. Jul. 25, 2005)*; *Cannon v. Newmar Corp., 210 F. Supp. 2d 461, 463 n.2 (S.D.N.Y. 2002)*; *see also Rockefeller Univ. v. Ligand Pharms., 581 F. Supp. 2d 461, 467 (S.D.N.Y. 2008)* (holding that authorization to do business in New York and designation of a registered agent for service of process "amount to consent to personal jurisdiction in New York.").

Only one Southern District of New York case, *Erne Shipping Inc. v. HBC Hamburg Bulk Carriers, GmbH & Co. KG, 409 F. Supp. 2d 427 (S.D.N.Y. 2006), overruled in part by Aqua Stoli, 460 F.3d at 446*, has found a foreign corporation's "mere filing for authorization to do business" in New York to be insufficient under Rule B, which the district court interpreted as requiring more "systematic and continuous" contacts. In contrast, every subsequent Southern District court to have considered the issue has held that registration with the Department of State pursuant to *New York Business Corporation Law § 1304*, [**11] constitutes being "found" within the district for purposes of *Rule B. See Marimed Shipping, 567 F. Supp. 2d at 528* (citing cases). *Erne* has been widely discussed, criticized, and rejected by the judges in the Southern District. *See, e.g., id.; Centauri Shipping, 528 F. Supp. 2d at 191-92.*

Under this majority view, amenability to suit, rather than a party's economic **[*132]** and physical activities in the district at issue, is the touchstone of the first prong of the *Seawind* Test. *See Integrated Container, 476 F. Supp. at 123*; *Centauri Shipping, 528 F. Supp. 2d at 191*. Recently, in *Aqua Stoli*, this Court declined to specifically discuss the "found" factor of the *Rule B* test, stating that district courts have not "experienced any confusion in its application," and citing *Integrated Container, 476 F. Supp. at 123*, in support of this contention. *460 F.3d at 445 n.4*. In *Integrated Container*, Judge Pierre N. Leval, then sitting on the district court, held that the jurisdictional presence factor is satisfied either where the defendant's "activity in the district" or its "contacts within the district . . . permit the court to exercise *in personam* jurisdiction over the defendant." *Id. at 122*. Applying **[**12]** this standard, the court in *Integrated Container* found that the defendant's registration as a foreign corporation with the New York Department of State, as well as its contractual consent to suit in New York, were sufficient to establish the defendant's presence within the district for purposes of *Rule B*. *Id*.

Moreover, the district courts' reasoning that registration with the State satisfies the jurisdictional prong of the test for being "found" is persuasive in light of the underlying purpose of maritime attachment. In the context of peripatetic defendants with transient assets, maritime attachment is aimed at obviating a plaintiff's need to determine where the defendant is amenable to suit. *See In re Louisville Underwriters, 134 U.S. at 493*. However, no "scour[ing of] the globe"--and, therefore, no

attachment--is necessary where the defendant has already voluntarily subjected itself to the district's jurisdiction by reason of its registration with the State. *See Amoco Overseas Oil, 605 F.2d at 655.*

"Maritime attachment is centuries old." *Winter Storm Shipping, Ltd. v. TPI, 310 F.3d 263, 267 (2d Cir. 2003)*; *accord Aurora Maritime Co. v. Abdullah Mohamed Fahem & Co., 85 F.3d 44, 47 (2d Cir. 1996)* **[**13]** ("[M]aritime attachment is a feature of admiralty jurisprudence that antedates both the congressional grant of admiralty jurisdiction to the federal district courts and the promulgation of the first Supreme Court Admiralty Rules in 1844."); *see also Atkins v. Fibre Disintegrating Co., 85 U.S. (18 Wall.) 272, 303, 21 L. Ed. 841 (1873).* It has long existed because of the highly international nature of maritime commerce and the transitory nature of maritime assets within a given jurisdiction. *See Aqua Stoli, 460 F.3d at 443*; *Aurora Maritime Co., 85 F.3d at 48*; *Amoco Overseas Oil Co. v. Compagnie Nationale Algerienne de Navigation, 605 F.2d 648, 655 (2d Cir. 1979).* But as the world changed, so too did the exact nature and necessity of maritime attachment. In 1966, when *Supplemental Rule B* was created, the Advisory Committee drew heavily upon Admiralty Rule 2. *See Supp. R. B*, Advisory Committee's Notes. By 1966, however, it was clear that the precise need for maritime attachment and nature of maritime commerce had changed a great deal over the previous several hundred years and was likely to continue to change. For that reason, neither *Supplemental Rule B* nor the Advisory Committee attempted to define **[**14]** what it means to be "found within the district." *See id.* Rather, the Advisory Committee stated that "[t]he

subject seems one best left for the time being to development on a case-by-case basis." *Id.* This, we believe, invited courts to define what it means to be "found" in a common law fashion. But common law development in time can yield firm rules. And that is precisely what we hold today.

[*133] In the modern era, although maritime commerce is still international and maritime assets are still transitory, companies that have both appointed an agent for service of process and registered in New York, consenting to jurisdiction, do not pose the same needs for maritime attachment. Indeed, in today's era of electronic banking, many of the assets that are attached in New York are not ships, but rather electronic wire transfers routed through banks. And in today's era, "[t]he frustrated creditor" is not "much like Evangeline, the poor Arcadian girl separated from her lover, . . . tragically left to roam the shores awaiting the debtor's next arrival." *Schiffahartsgesellschaft Leonhardt & Co. v. A. Bottacchi S.A. de Navegacion, 732 F.2d 1543, 1548 (11th Cir. 1984)* (referencing Henry Wadsworth Longfellow, **[**15]** Evangeline, *A Tale of Acadie* (1843)). Rather, when that debtor is registered to do business in New York, there are generally any number of means to prosecute a civil claim and, upon receiving judgment, collect on that claim.

Thus, we hold that a defendant's registration under *New York Business Corporation Law § 1304* is sufficient to satisfy both prongs of the *Seawind* Test and, therefore, a company registered with the Department of State is "found" for purposes of *Rule B of the Supplemental Rules* for Admiralty or Maritime Claims and Asset Forfeiture Actions.

Applying this rule to the case at hand, we find that STX is present in the district both jurisdictionally, by virtue of its registration with the Department of State, and in terms of its ability to accept service of process, by virtue of its appointment of a designated agent for service of process within the district. Both of these are accomplished through its registration with the Department of State pursuant to *§ 1304*. [2]

> 2 STX itself conceded that Defendants' registration with the State subjects them to personal jurisdiction. When asked "Is there any way they can argue they can't be sued and a judgment enforced against them in this **[**16]** jurisdiction," by Judge Daniels, counsel for STX answered, "I don't believe so . . ." Previously, counsel for STX had stated that "[Defendants are] subject to personal jurisdiction by virtue of their registration."

Because STX is not entitled to maintain its attachment by virtue of the Defendants' being "found" within the district, it cannot demonstrate a likelihood of success on the merits for purposes of its motion, and, necessarily, it also loses the underlying appeal. We thus affirm the district court's vacatur of the maritime attachment and dismiss the motion as moot.

CONCLUSION

For the foregoing reasons, the district court's order of December 10, 2008 vacating the *ex parte* Process of Maritime Attachment and Garnishment is hereby AFFIRMED. The motion for a stay of that

order pursuant to *Federal Rule of Appellate Procedure 8(a)* is DISMISSED AS MOOT.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CENTAURI SHIPPING, LTD., Plaintiff, -v- WESTERN BULK CARRIERS KS, WESTERN BULK CARRIERS AS, and WESTERN BULK AS, Defendant.	Case No. 07 Civ. 4761 (RJS) ORDER

RICHARD J. SULLIVAN, District Judge:

The Court having conducted a post-attachment hearing pursuant to Supplemental Admiralty Rule E(4)(f) on September 5, 2007 and having ruled on the record in open court on September 7, 2007 that the Court's June 5, 2007 Ex Parte Order for Process of Maritime Attachment and Garnishment and June 15, 2007 Order providing for the substitution of attached funds with a surety bond be vacated on the basis that the technical requirements for issuance of the June 5, 2007 Ex parte Order pursuant to Supplemental Admiralty Rule B(1)(a) were not met because the Defendant, Western Bulk Carriers K/S was, in fact, present in the District on June 5, 2007 for purposes of Supplemental Admiralty Rule b, both jurisdictionally, by virtue of its June 22, 2005 registration with the New York Secretary of State, Department of Corporations to conduct business in

the State of New York, and readily in terms of its amenability to accept service of process by virtue of its June 22, 2005 appointment of a designated agent for service of process within the District,

IT IS ORDERED that the Court's June 5, 2007 Ex Parte Order for Process of Maritime Attachment and Garnishment and June 15, 2007 Order providing for the substitution of attached funds with a surety bond be and hereby are vacated;

IT IS FURTHER ORDERED that after the expiration of 10 days from the date this Order is entered on the Court's docket the Plaintiff shall return to the Defendant, Western Bulk Carriers K/S, the surety bond it posted on June 15, 2007;

IT IS FURTHER ORDERED that the Plaintiff shall advise the Court by September 17, 2007 if it intends to file an Amended Complaint setting forth a proper jurisdictional basis for its claims in this Court.

Dated: September 12, 2007
New York, New York

RICHARD J. SULLIVAN
UNITED STATES DISTRICT JUDGE

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CENTAURI SHIPPING LTD., Plaintiff, VERSUS WESTERN BULK CARRIERS KS, WESTERN BULK CARRIERS, AS, AND WESTERN BULK, AS, Defendants.

No 07-CV-4761 (RJS) (HBP)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

528 F. Supp. 2d 186; 2007 U.S. Dist. LEXIS 77953; 2008 AMC 43

October 12, 2007, Decided
October 12, 2007, Filed

SUBSEQUENT HISTORY: Sanctions disallowed by, Request denied by *Centauri Shipping Ltd. v. Western Bulk Carriers KS, 528 F. Supp. 2d 197, 2007 U.S. Dist. LEXIS 83134 (S.D.N.Y., Nov. 5, 2007)*

COUNSEL: [**1] Plaintiff is represented by Kirk M.H. Lyons, Esq., Lyons & Flood, L.L.P., New York, New York.

Defendants are represented by Kevin John Lennon, Esq., and Patrick F. Lennon, Esq., Lennon, Murphy & Lennon, LLC, New York, New York.

JUDGES: RICHARD J. SULLIVAN, United States District Judge.

OPINION BY: RICHARD J. SULLIVAN

OPINION

[*187] MEMORANDUM AND ORDER

October 12, 2007

RICHARD J. SULLIVAN, District Judge:

Plaintiff Centauri Shipping Ltd. ("Centauri") commenced the above-entitled action on June 5, 2007, seeking, *inter alia,* a writ of attachment pursuant to Rule B of the Federal Rules of Civil Procedure, Supplemental Rules for Certain Admiralty and Maritime Claims. On that date, the Honorable Kenneth M. Karas, District Judge, signed an order permitting plaintiff to attach assets of defendants Western Bulk Carriers KS ("defendant" or "WBC KS"), Western Bulk Carriers AS ("WBC AS"), and Western Bulk AS (collectively, the "WBC Group"), in the amount of $ 15,350,796.00 (hereinafter, "the attachment order"). (*See* Order dated June 5, 2007.) Subsequently, by order dated September 7, 2007, the Court vacated the attachment order (hereinafter, "the *vacatur*").

Plaintiff now moves, pursuant to *Rule 62 of the Federal Rules of Civil Procedure*, [**2] to stay the *vacatur* during the pendency of the appeal of that order or, in the alternative, to stay the *vacatur* temporarily so that plaintiff may apply for a stay to the Second Circuit Court of Appeals. For the following reasons, the Court denies plaintiff's motion for a stay pending appeal, and orders a temporary stay pending resolution of plaintiff's application to the Court of Appeals.

I. BACKGROUND AND PROCEDURAL HISTORY

The Court presumes the parties' familiarity with the facts and procedural history of this action. Below, the Court briefly recites the facts necessary to resolve the instant motion: [1]

> 1 The facts recited herein are undisputed, unless otherwise noted.

On June 5, 2007, Centauri commenced this action by filing a complaint and a proposed *ex parte* order of attachment against WBC KS and two distinct corporate entities that co-own WBC KS. (Compl. P 3; Vangsnes Decl. P 10.) In support of the proposed attachment order, Centauri's counsel submitted an affirmation (the "June 5 affirmation") stating, *inter alia*, that:

> Your affiant [plaintiff's counsel] has attempted to locate the defendants . . . within this District. As part of the investigation, my office has contacted the Division [**3] of Corporations of the New York Department of State and found no

> records indicating that defendants were either incorporated or licensed to do business in the State of New York. . . . I declare and state under the penalty of perjury that the foregoing is true and correct.

(Lyons Aff. dated June 5, 2007, P 2.)

On June 5, 2007, Judge Karas signed the *ex parte* attachment order. Thereafter, Centauri proceeded to attach assets of WBC KS found within the Southern District of New York (the "District") in the amount of $ 15,350,796.00. (Lyons Aff. dated Sept. 17, 2007 (hereinafter, "Lyons Aff."), P 2.) On June 15, 2007, upon WBC KS' motion, Judge Karas signed an order dissolving the attachment and directing WBC KS to post a bond in the amount equal to the attached assets (the "surety bond"). (Order dated June 15, 2007.)

Subsequently, on August 10, 2007, WBC KS moved to vacate the attachment order pursuant to *Rule E of the Supplemental Rules for Certain Admiralty and Maritime Claims* ("Rule E"). In its moving papers, WBC KS asserted that the above-quoted portion of the June 5 affirmation of plaintiff's **[*188]** counsel was demonstrably false, and that, in fact, WBC KS had been licensed as a foreign corporation **[**4]** in New York State since 2005 and was so licensed at the time that plaintiff sought and obtained the attachment order. (Lennon Decl. P 5.)

By letter dated August 16, 2007, plaintiff's counsel represented to the Court that, at the time he submitted the proposed attachment order and the

June 5 affirmation, he had "knowledge that defendant [WBC KS] was registered" with the State as a foreign corporation. (Pl.'s Aug. 16, 2007 Ltr., at 2.) However, according to plaintiff's counsel, the false statements regarding WBC KS' registration were included in the June 5 affirmation due to a purported "clerical error" by plaintiff's counsel. [2] (*Id.*)

> 2 On September 12, 2007, the Court directed plaintiff's counsel to show cause as to why the Court should not impose sanctions on counsel pursuant to *Rule 11(b) of the Federal Rules of Civil Procedure*, in light of counsel's submission of a demonstrably false affidavit. The issue of whether to impose sanctions on plaintiff's counsel is now pending before the Court.

On September 5, 2007, the undersigned heard oral argument regarding the motion to vacate. [3] (*See* Tr. of Proceedings on Sept. 5, 2007.) By oral decision on September 7, 2007, the Court granted WBC [**5] KS' motion to vacate the attachment and stated the reasons therefor on the record (the "*vacatur decision*"). (*See* Tr. of Proceedings on Sept. 7, 2007 (hereinafter, "Tr. of the *Vacatur* Decision").) On September 12, 2007, the Court issued the *vacatur*, lifting the attachment and directing plaintiff to return the surety bond to WBC KS after the expiration of ten days from the date of the *vacatur*.

> 3 This action was reassigned to the undersigned on September 4, 2007.

On September 17, 2007, plaintiff filed a notice of appeal of the *vacatur* with the Court of Appeals for the Second Circuit. Also on September 17, 2007,

plaintiff filed a motion with this Court to stay the *vacatur* pending appeal. On September 28, 2007, the Court heard oral argument regarding plaintiff's motion to stay. (*See* Tr. of Proceedings on Sept. 28, 2007.)

II. STANDARD OF REVIEW

As a threshold matter, the Court must determine the correct subsection of *Rule 62* to apply to plaintiff's motion. In their submissions to the Court, the parties address plaintiff's motion as one made under *subsection (d) of Rule 62*. However, it is well-settled that *subsection (d)* applies exclusively to stays of money judgments, and permits the moving **[**6]** party to obtain a stay *as of right* upon the posting of a *supersedeas* bond. *See, e.g, Perez & CIA, Inc., v. United States, 747 F.2d 813, 816 (1st Cir. 1984)* (Breyer, J.) (observing that *Rule 62(d)* "is likely aimed at money judgments, the value of which can be calculated and secured with relative ease") (internal citation omitted); *In re Tower Automotive, Inc., No. 06-CV-2105 (RWS), 2007 U.S. Dist. LEXIS 49282, 2007 WL 1975447, at * 1-2 (S.D.N.Y. July 6, 2007)* (finding that "*Rule 62(d)* is inapplicable" where "the [c]ourt's [o]pinion was not a money judgment, but rather a declaratory judgment which determined the scope of [a party's monetary] obligation"); *see also Hebert v. Exxon Corp., 953 F.2d 936, 938 (5th Cir. 1992)* (granting a *Rule 62(d)* stay only where the declaratory judgment required payment of "a specific sum of money"); *Government Guar. Fund of Fin. v. Hyatt Corp., 167 F.R.D. 399, 400, 34 V.I. 274 (D.V.I. 1996)* ("Although the issue appears not to have arisen very often, those courts to address it have limited the applicability of *Rule 62(d)* to appeals from

money judgments or their equivalent.") (internal citations omitted).

Accordingly, the Court finds that *subsection (c)*, rather than *subsection (d)*, of **[*189]** *Rule 62* should **[**7]** apply in this case. *Rule 62(c)* provides, in pertinent part:

> When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party.
>
> *Fed. R. Civ. P. 62(c).*

In the instant case, it is clear that plaintiff's motion should be analyzed under *subsection (c)* because the *vacatur* effectively "lift[ed] . . . an injunction" which provided for the attachment of defendants' assets, *see Fed. R. Civ. P. 62(c)*, and ordered plaintiff "to do" an affirmative act -- namely, to return the surety bond to defendant, *see Donovan v. Fall River Foundry Co., 696 F.2d 524, 526 (7th Cir. 1982)* ("The reference in *Rule 62(d)* to *supersedeas* bond suggests that had the framers thought about the point they would have limited the right to an automatic stay to cases where the judgment being appealed from was a 'money judgment.' . . . But this solution makes little sense as applied to an order to do, rather than an order to pay, whether or not the

order to [**8] do is a conventional injunction."). *See In re Tower Automotive, Inc., 2007 U.S. Dist. LEXIS 49282, 2007 WL 1975447, at *1-2*; *accord Perez & CIA., Inc., 747 F.2d at 816* (applying *subsection (c)* rather than *subsection (d)* to "[a] case in which a party seeks review of an agency's suspension order, . . . [because it] is more naturally viewed as a case involving an order to do, or not to do, something (that is, involving something like an injunction) rather than a case involving a money judgment") (internal citation omitted).

In any event, the Court notes that, although the parties specifically cite *subsection (d)* in their submissions, both characterize plaintiff's motion as an application for the Court to exercise its *discretion* to stay the *vacatur* pending appeal, and both present arguments relating to the factors for a discretionary stay under *Rule 62(c)*. (*See* Pl.'s Mem. at 3; Defs.' Mem. at 3.)

III. DISCUSSION

A. The Relevant Factors

> The factors relating to a discretionary stay under *Rule 62(c)* include:
>
> (1) Whether the movant has demonstrated "a substantial possibility, although less than a likelihood, of success" on appeal;
>
> (2) The risk of irreparable injury to the movant absent a stay;
>
> (3) The lack of substantial harm [**9] to the non-movant if the stay is granted;

(4) The public interests that may be affected.

Hirschfeld v. Bd. of Elections, 984 F.2d 35, 39 (2d Cir. 1993) (internal citations omitted); *Tower Automotive, 2007 U.S. Dist. LEXIS 49282, 2007 WL 1975447, at * 1-2*. In making such a determination, "[t]he Court treats these factors 'somewhat like a sliding scale.'" *United States v. VISA U.S.A., Inc., No. 98-CV-7076 (BSJ), 2007 U.S. Dist. LEXIS 58018, 2007 WL 2274866, at *1 (S.D.N.Y. Aug. 7, 2007)* (quoting *Thapa v. Gonzales, 460 F.3d 323, 334 (2d Cir. 2006)*). Thus, "'the necessary level or degree of possibility of success will vary according to the court's assessment of the other stay factors.'" [4] *Id.* (quoting *Thapa, 460 F.3d at 334*) (additional internal quotation marks **[*190]** and citation omitted); *see also Hayes v. City Univ. of New York, 503 F. Supp. 946, 962 (S.D.N.Y. 1980)* ("Issuance of a stay pending appeal is discretionary and equitable . . .").

4 Defendant asserts that a movant's "'failure to satisfy one prong of the standard for granting a stay pending appeal dooms the motion.'" (Defs.' Br. at 3 (quoting *Covanta Onondaga Ltd. P'ship v. Onondaga County Resource Recovery Agency, No. 02-CV-492, 2002 U.S. Dist. LEXIS 20298, 2002 WL 31399797, at *2 (N.D.N.Y. Oct. 24, 2002)).*) The Court **[**10]** notes that its review of relevant authority regarding the above-cited standard does *not* indicate that the movant's failure to satisfy one factor "dooms the motion." (*Id.*) Rather, as noted *supra*, it is well-settled that the above-cited factors are treated

as a "sliding scale," wherein "'more of one excuses less of the other.'" *Thapa, 460 F.3d at 334* (citing *Mohammed v. Reno, 309 F.3d 95, 100 (2d Cir. 2002)).* In addition, the single district court case cited by defendant in support of this proposition, *Covanta Onondaga,* appears to have derived the "failure as to one, failure as to all" rule from a line of decisions addressing applications for stays under the Bankruptcy Rules. *See Covanta Onondaga, 2002 U.S. Dist. LEXIS 20298, 2002 WL 31399797, at *2* (citing *Green Point Bank v. Treston, 188 B.R. 9,12 (S.D.N.Y. 1995)* (denying an application for a stay of a bankruptcy court order under *Bankruptcy Rule 8005*)). As such, the Court declines to apply the rule advanced by defendants, and, instead, adopts the "sliding scale" approach employed by the Court of Appeals for the Second Circuit and the overwhelming majority of district courts in this Circuit.

For the following reasons, the Court concludes, upon examination of these **[**11]** factors, that plaintiff's motion to stay the *vacatur* pending appeal should be denied.

1. Substantial Possibility of Success On Appeal

Plaintiff asserts that the *vacatur* was wrongly decided, and, more specifically, that there is a substantial possibility that the Court of Appeals will adopt plaintiff's position on the issue of whether defendant WBC KS can be "found" within the District for the purposes of *Rule B.* [5] Defendants respond that plaintiff has merely reiterated arguments that were previously rejected by this

Court in the *vacatur* decision, and that the authorities relied on by the Court in that decision indicate that there is not a substantial possibility that plaintiff's position will prevail on appeal.

> 5 As discussed in the *vacatur* decision, *Rule B* provides that, for an order of attachment to issue, the plaintiff must establish that the defendant cannot be "found within the district." Rule B(1)(a). The Second Circuit has held that this requirement presents "a two-pronged inquiry: First, whether (the respondent) can be found within the district in terms of jurisdiction, and second, if so, whether it can be found for service of process." *Seawind Compania, S.A. v. Crescent Line, Inc., 320 F.2d 580, 582 (2d Cir.1963)* **[**12]** (internal quotation marks and citations omitted). The Court notes that plaintiff has conceded that the second prong of the *Seawind* test has been satisfied in this action. Specifically, it is undisputed that WBC KS has a designated agent for service of process in this District. However, the parties have vigorously disputed whether defendant was present for jurisdictional purposes within the District at the time of attachment. In the *vacatur* decision, the Court found that defendant was present for jurisdictional purposes.

The "key inquiry" with regard to the jurisdictional presence issue is "whether the defendant is amenable to suit within the district." [6] (*See* Tr. of *Vacatur Decision*, **[*191]** at 7.) Upon consideration of defendant's motion to vacate the attachment order, the Court conducted such an inquiry and concluded

that WBC KS has unambiguously made itself amenable to suit within the District. (*See id.* at 3-8.) With regard to the instant motion, the Court adheres to its prior determination on this issue, and further finds, for the following reasons, that plaintiff's position -- namely, that defendant's amenability to suit in the District is insufficient, by itself, to establish defendant's **[**13]** presence here -- does not present a "substantial" possibility of success on appeal.

> 6 As a threshold matter, the Court notes that there is a split of authority among district courts in this circuit as to the central issue in this action -- namely, whether defendant's registration in New York State as a foreign corporation and its consent to this Court's jurisdiction, taken together, are sufficient to establish under Rule B that defendant can be "found" for jurisdictional purposes within the District. *Compare Express Sea Transport Corp., v. Novel Commodities S.A.*, No. 06-CV-2404 (GEL) (Tr. of Oral Decision issued on May 4, 2006) (S.D.N.Y. 2006) (finding that the defendant's registration as a foreign corporation in New York State and its consent to the court's jurisdiction were sufficient to establish that it "can be found within the district for the purposes of jurisdiction"), *with Erne Shipping Inc. v. HBC Hamburg Bulk Carriers GmbH & Co. KG, 409 F. Supp. 2d 427, 438 (S.D.N.Y. 2006)* ("[W]e do not consider such filing to be sufficient to make a showing that a defendant is 'found' within the district."). Nevertheless, notwithstanding the divergent authority on this

issue, the Court finds, [**14] for the reasons set forth herein and for the reasons stated on the record in the *vacatur* decision, that plaintiff has failed to establish a possibility of success on appeal.

In evaluating the jurisdictional presence factor under *Rule B*, the Second Circuit and the majority of district courts in this Circuit have focused principally upon that party's amenability to suit rather than the party's economic and physical activities in the district at issue. In *Integrated Container, Inc. v. Starlines Container Shipping, Ltd., 476 F. Supp. 119, 123 (S.D.N.Y. 1979)*, Judge Leval, sitting on the district court, held that the defendant could be "found" within the district for jurisdictional purposes based on, *inter alia*, the defendant's registration as a licensed foreign corporation within New York State and an agreement in which the defendant expressly consented to "the jurisdiction of the courts of New York." [7] More recently, the Second Circuit declined to discuss specifically the presence factor, but, instead, cited *Integrated Container* for the proposition that district courts have not "experienced any confusion in its application." *Aqua Stoli Shipping Ltd. v. Gardner Smith Pty Ltd., 460 F.3d 434, 445 n.4 (2d Cir. 2006)*. [**15] Indeed, the court in *Aqua Stoli* specifically characterized the district court's opinion in *Integrated Container* as "explaining the [presence] requirement." *Aqua Stoli, 460 F.3d at 445 n.4*.

7 The court in *Integrated Container* also relied on the fact that the defendant had entered into a third agreement which "called for submission to arbitration in New York with New York law to apply." *476 F. Supp. at 123*. In addition, the

> Court notes that, ultimately, the *Integrated Container* court declined to vacate the maritime attachment in that case because the defendant did not satisfy the service of process prong of the *Seawind test*. By contrast, in the instant case, as noted *supra*, it is undisputed that WBC KS has satisfied the service of process prong of the *Seawind* test.

Plaintiff argues that the court in *Integrated Container* specifically rejected the "notion . . . that an agent in the district over whom personal jurisdiction could be gained . . . was alone sufficient to meet the jurisdictional presence prong under Rule B." (Pl.'s Mem. at 7.) Instead, according to plaintiff, the court in *Integrated Container* "required something more than the mere presence of an agent in the district" for the **[**16]** purposes of the jurisdictional presence factor. (*Id.*) However, plaintiff offers an overly narrow view of the scope of the court's holding in *Integrated Container* regarding the jurisdictional presence factor. Rather, in *Integrated Container*, the court held that the jurisdictional presence factor is satisfied either where the defendant's "activity in the district" or its "contacts with the district . . . permit the court to exercise *in personam* jurisdiction over the defendant." *476 F. Supp. at 122*. Applying this standard, the court found that the defendant's registration as a foreign corporation in New York State and its consent via contract to the court's jurisdiction and to arbitration within New York State were sufficient to establish the defendant's jurisdictional presence in the district at issue. *See id. at 123*.

Similarly, in this case, it is undisputed that, as noted *supra*, WBC KS is a registered foreign corporation within the State of New York and, as such, under well-settled principles of New York State law, WBC KS has consented to general jurisdiction in the courts of the state, and, **[*192]** consequently, in this Court. *See Speed v. Pelican Resort N.V. No. 91-CV-7686 (SWK), 1992 U.S. Dist. LEXIS 8278, 1992 WL 147646, at *1 (S.D.N.Y. June 16, 1992)* **[**17]** (finding, with regard to a Netherlands Antilles corporation, that "it is clear that 'if a foreign corporation is authorized to do business in this state, a court is justified in inferring that it is doing business so that it is subject to jurisdiction of the courts.") (quoting 14 N.Y. Jur. 2d, Business Relationships § 522 (1981)); *accord Iyalla v. TRT Holdings, Inc., No. 04-CV-8114 (NRB), 2005 U.S. Dist. LEXIS 14913, 2005 WL 1765707, at *3 (S.D.N.Y. July 25, 2005)* ("[A]ny corporation registered to do business within the state is subject to personal jurisdiction in the state."); *Obabueki v. IBM, Nos. 99-CV-11262, 99-CV-12486 (AGS), 2001 U.S. Dist. LEXIS 11810, 2001 WL 921172, at *5 (S.D.N.Y. Aug. 14, 2001).* Furthermore, it is beyond doubt that WBC KS has specifically consented, on the record, to the jurisdiction of this Court for the purposes of any and all proceedings relating to this action. [8] Accordingly, based on the close similarity of the facts relating to the presence issue in this case with those found in *Integrated Container*, the fact that the Second Circuit has recently cited with approval the analysis of that issue by the district court in *Integrated Container*, and, as set forth in the *vacatur* decision, this Court's prior determination **[**18]** that the controlling factor with regard to

jurisdictional presence is the defendant's amenability to suit in the District, the Court finds that plaintiff's position does not present a substantial possibility of success on appeal.

> 8 Defendant's counsel stated such consent in two appearances before the Court: during argument regarding the *vacatur* and, once again, during argument regarding the instant motion to stay. (*See* Tr. of *Vacatur* Decision, at 7; Tr. of Proceedings on Sept. 28, 2007, at 12.)

2. The Risk of Irreparable Injury to Plaintiff

Plaintiff asserts that, absent a stay of the *vacatur*, there is a significant risk of irreparable injury to plaintiff. Specifically, plaintiff asserts that, absent a stay of the *vacatur*, WBC KS may withdraw its registration as a licensed foreign corporation in New York State, thus preventing this Court and/or the Court of Appeals from exercising jurisdiction over WBC KS. In addition, plaintiff argues that, if WBC KS is permitted to remove the surety bond, WBC KS may subsequently experience a financial downturn which may, in the absence of the surety bond, frustrate plaintiff's efforts to collect on any future money judgment obtained by plaintiff against **[**19]** defendant. The Court rejects both of plaintiff's arguments and, instead, finds that, absent a stay, there is little risk that plaintiff will suffer irreparable injury that cannot be compensated by money damages.

a. Loss of Jurisdiction Over Defendant

The Court rejects plaintiff's assertion that defendant's de-registration as a licensed foreign

corporation in New York would somehow prevent this Court and/or the Court of Appeals from exercising jurisdiction over defendant. As an initial matter, the Court notes that plaintiff has failed to offer any evidence that defendant intends to de-register, and defendant vigorously asserts its intention to maintain its current registration status. However, even assuming *arguendo* that defendant is likely to de-register and, subsequently, remove its assets from the District, it is beyond doubt that this Court and the Court of Appeals would retain jurisdiction over this action.

In *Republic National Bank of Miami v. United States, 506 U.S. 80, 87-88, 113 S. Ct. 554, 121 L. Ed. 2d 474 (1992)*, the Supreme Court, applying admiralty principles to a civil forfeiture proceeding, [9] found **[*193]** that, while a district court must have jurisdiction over a *res* to *initiate* an *in rem* action, it need not maintain **[**20]** continuous control of the *res* to *maintain* jurisdiction of the action. The Court observed:

> Stasis is not a general prerequisite to the maintenance of jurisdiction. Jurisdiction over the person survives a change in circumstances, *Leman v. Krentler-Arnold Hinge Last Co., 284 U.S. 448, 454, 52 S. Ct. 238, 76 L. Ed. 389, 1932 Dec. Comm'r Pat. 564 (1932)* ("[A]fter a final decree a party cannot defeat the jurisdiction of the appellate tribunal by removing from the jurisdiction, as the proceedings on appeal are part of the cause," citing *Nations v. Johnson, 65 U.S.C. (24 How.) 195, 16 L. Ed. 628*

(1861)), as does jurisdiction over the subject matter, *Louisville, N.A. & C.R. Co. v. Louisville Trust Co., 174 U.S. 552, 566, 19 S. Ct. 817, 43 L. Ed. 1081 (1899)* (midsuit change in the citizenship of a party does not destroy diversity jurisdiction); *St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U.S. 283, 289-290, 58 S. Ct. 586, 82 L. Ed. 845 (1938)* (jurisdiction survives reduction of amount in controversy). Nothing in the nature of *in rem* jurisdiction suggests a reason to treat it differently.

Republic Nat'l Bank, 506 U.S. at 87-88.

9 *28 U.S.C. § 2461(b)* directs federal courts to conduct civil forfeiture proceedings in a manner "as near as may be to proceedings in admiralty."

In the context of maritime attachments, at least one **[**21]** circuit has, not surprisingly, read the holding in *Republic National Bank* to "eliminate any requirement on a party seeking to institute a maritime attachment to obtain a stay or post a *supersedeas* bond to preserve the district court's jurisdiction over the garnished funds while [that party] appealed the release of the garnished funds." *Stevedoring Servs. of Am. v. Ancora Transp., N.V., 59 F.3d 879, 882 (9th Cir. 1995)* ("We conclude that the district court's release of the garnished funds . . . did not divest the court of jurisdiction over the *res.*") [10]; *see also Ventura Packers, Inc. v. F/V Jeanine Kathleen, 424 F.3d 852, 860, 861 (9th Cir. 2005)* ("In

short, *in rem* or *quasi in rem* jurisdiction remains throughout the course of an appeal, as long as jurisdiction was properly obtained at the initiation of the action. Otherwise, the prevailing party could frustrate the losing party's appeal by transferring the *res* out of the district court's jurisdiction, a practice to which [t]he Supreme Court objected in no uncertain terms in *Republic National Bank*.") (internal quotation marks and citation omitted).

> 10 The court in *Stevedoring Services* rejected as immaterial the lone fact that could have **[**22]** served to undermine the application of the *Republic National Bank* holding in the context of maritime attachments; specifically, the court refused to distinguish the Supreme Court's holding based upon the fact that the forfeiture action at issue in *Republic National Bank* was an *in rem* proceeding and that maritime attachments are *quasi in-rem* proceedings. *See Stevedoring Servs., 59 F.3d at 882-83* ("[T]his difference suggests no reason why we should distinguish the Supreme Court's decision in [*Republic National Bank*].").

Here, the Court adopts the sound reasoning of the Ninth Circuit in *Stevedoring Services* in applying the holding of *Republic National Bank* to the maritime attachment context, and, as such, concludes that defendant's de-registration, and the subsequent removal of defendant's assets from the District, will not divest this Court or the Court of Appeals of jurisdiction over defendant. Accordingly, the Court rejects the alleged injury regarding the loss of jurisdiction over defendant as a basis for a stay.

b. Plaintiff's Inability to Enforce Money Judgments Against Defendant

Plaintiff also asserts that "the loss of the surety bond [posted by defendant] in this **[*194]** matter would be **[**23]** an irreparable injury, since there is a reasonable chance that [defendant] may not be able to satisfy" future money judgments obtained by plaintiff against defendant. (Pl.'s Mem. at 14.) The Court rejects this alleged injury as a basis for a stay pending appeal. Instead, the Court finds that the monetary injury alleged by plaintiff is not the type of injury that may justify a stay of the *vacatur* pending appeal.

"As a general matter, because monetary injury can be estimated and compensated, the likelihood of such injury usually does not constitute irreparable harm." *Brenntag Int'l Chems., Inc. v. Bank of India, 175 F.3d 245, 249 (2d Cir. 1999)* (citing *Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc., 596 F.2d 70, 72 (2d Cir. 1979)* (per curiam); *see also Ford v. Reynolds, 316 F.3d 351, 355 (2d Cir. 2003)* ("To establish irreparable harm, the injury alleged 'must be one requiring a remedy of more than mere money damages.") (quoting *Tucker Anthony Realty Corp. v. Schlesinger, 888 F.2d 969, 975 (2d Cir. 1989)*); *E.E.O.C. v. Local 638, No. 71-CV-2877 (RLC), 1995 U.S. Dist. LEXIS 7756, 1995 WL 355589, at *2 (S.D.N.Y. June 7, 1995)* ("Irreparable injury means 'the kind of injury for which money cannot compensate,' and therefore **[**24]** '[a] monetary loss will not suffice unless the movant provides evidence of damage[] that cannot be rectified by financial compensation.'") (quoting *Sperry Int'l Trade, Inc. v. Gov't of Israel, 670 F.2d 8, 12 (2d Cir. 1982)*, and

Tucker Anthony Realty Corp., 888 F.2d at 975). However, "courts have excepted from the general rule regarding monetary injury situations involving obligations owed by insolvents." *Brenntag Int'l Chems., Inc., 175 F.3d at 250* (collecting cases). Accordingly, monetary injury *may* suffice to establish irreparable harm in situations "where the party that might ultimately be ordered to pay the monetary damages is insolvent or facing imminent bankruptcy, or is in a perilous financial state." *Bridgeport, Port Jefferson Steamboat Co. v. Bridgeport Port Auth., No. Civ. A. 3:03-CV-599 (CFD), 2004 U.S. Dist. LEXIS 6643, 2004 WL 840140, at *3 (D. Conn. April 15, 2004)* (internal quotation marks and citations omitted); *accord Sea Carriers Corp. v. Empire Programs, Inc., No. 04-CV-7395 (RWS), 2006 U.S. Dist. LEXIS 83843, 2006 WL 3354139, at *4 (S.D.N.Y. Nov. 20, 2006)* ("Monetary loss therefore will not suffice unless the movant shows damage that cannot be rectified by financial compensation . . . . One such exception is where the party **[**25]** to be enjoined is shown to be insolvent or imminently insolvent."); *Mitsubishi Power Sys., Inc. v. Shaw Group, Inc., No. 04-CV-1251 (RMB), 2004 U.S. Dist. LEXIS 4125, 2004 WL 527047, at *2 (S.D.N.Y. March 16, 2004)* ("Courts have generally applied this limited exception where insolvency is imminent.").

Here, it is beyond doubt that the injuries alleged by plaintiff are *not* ones requiring a remedy of more than money damages: plaintiff specifically seeks to ensure that it will be able to collect on money judgments against WBC KS.

Furthermore, plaintiff has failed to establish that any judgment against defendant WBC KS would

otherwise be uncollectible. Plaintiff has not asserted that WBC KS is currently insolvent, and the Court rejects as mere speculation plaintiff's assertions regarding the perilous financial condition of WBC KS. Indeed, although plaintiff has shown that WBC KS has experienced some financial losses within the past four years, it is clear that WBC KS retains sizable assets and, as of August 31, 2007, had generated pre-tax profits of $ 20.4 million during the current financial year. (Vangsnes Decl. PP 11, 15.) As such, WBC KS does not appear to be experiencing the financial distress that other courts **[**26]** have required before applying the "imminent insolvency" exception to the monetary injury rule. *See, e.g., Mitsubishi Power Sys., 2004 U.S. Dist. LEXIS 4125, 2004 WL 527047, at *4* **[*195]** (citing, *inter alia*, the following cases: *Meringolo v. Power2Ship, No. 03-CV-4476 (PKL), 2003 U.S. Dist. LEXIS 12997, 2003 WL 21750009, at *3-5 (S.D.N.Y. July 28, 2003)* (denying preliminary injunction and declining to apply the imminent insolvency exception even though the defendant company had "generated almost no revenue from its inception [and] has never earned a profit since its formation," and its "independent auditors have qualified the company's financial statements as a 'going concern.'"); *General Transp. Servs. Inc. v. Kemper Ins. Co., No. 5:03-CV-620, 2003 U.S. Dist. LEXIS 12630, 2003 WL 21703635, at *3-4 (N.D.N.Y. June 25, 2003)* (denying a preliminary injunction and finding that "although Plaintiff arguably raises questions about [the defendant's] present financial condition, its assertions fall far short of establishing that [the defendant] is in 'imminent' danger of becoming insolvent," even where the defendant's credit rating had been

downgraded to "C++" and the defendant had defaulted on $ 700 million of its notes and laid off 1,000 of its 7,000 employees)). Accordingly, the **[**27]** Court finds that plaintiff has fallen short of establishing WBC KS' imminent insolvency so as to establish a risk of irreparable injury. Therefore, because "[t]he possibility that adequate compensatory or other corrective relief will be available at a later date . . . weighs heavily against a claim of irreparable harm," *Sampson v. Murray, 415 U.S. 61, 90, 94 S. Ct. 937, 39 L. Ed. 2d 166 (1974)*, the Court rejects plaintiff's alleged monetary injury as a basis for a stay of the *vacatur* pending appeal. [11]

11 Plaintiff also cites to *Swift Co. Packers v. Compania Colombiana Del Caribe, S.A., 339 U.S. 684, 689, 70 S. Ct. 861, 94 L. Ed. 1206 (1950)*, in support of its argument regarding irreparable harm. Specifically, plaintiff cites *Swift* for the proposition that "[a]ppellate review of the order dissolving the attachment at a later date would be an empty rite after the vessel had been released and the restoration of the attachment only theoretically possible." *Id. at 689*. The Court finds that *Swift*, and the quotation therefrom, are not relevant to the irreparable harm inquiry in the instant, case. *Swift* addressed the issue of whether "the order vacating the attachment was not a final order and therefore not reviewable" by the appellate court. *Id. at 688*. **[**28]** By contrast, the issue here is whether equity favors a stay of the *vacatur* pending appeal. Furthermore, the circumstances of *Swift* -- involving the attachment of a vessel -- contrast significantly

with those of the instant case, wherein the *vacatur* relates exclusively to the release of security posted by defendants. Thus, as discussed herein, the Court finds that the concern enunciated in *Swift* is absent from the instant case -- there is no significant risk that plaintiff's appeal will prove an "empty rite," at least where plaintiff does not seek to attach a vessel and the Court may direct defendant to post security following an appeal, if necessary.

3. Substantial Harm to Defendant

Defendant asserts that, if a stay is entered, it will suffer substantial harm in the form of the continued cost of maintaining the surety bond during the pendency of an appeal, and the consequent loss of "the use of a percentage of its credit facility." (Defs.' Mem. at 9-10.) In response, plaintiff asserts that a stay will not result in substantial harm to defendant because plaintiff is prepared to post a bond to cover the cost of maintaining the surety bond during the appeal. (Pl.'s Mem. at 14-15.) The Court **[**29]** finds that this factor weighs in favor of granting a stay. Thus, assuming *arguendo* that plaintiff could post a sufficient bond to satisfy the Court, any financial harm suffered by defendant is unlikely to be substantial.

4. The Public Interest

Plaintiff asserts that the public's interest in ensuring the enforcement of foreign judgments -- such as the judgment plaintiff expects to obtain against defendant in the courts of Angola -- favors a stay of the *vacatur* pending appeal. The Court rejects this argument. Initially, the Court notes that

plaintiff fails to cite any authority **[*196]** in support of the alleged public interest. In addition, it is beyond doubt that plaintiff has yet to obtain a judgment against defendant in the Angolan action. As such, the Court finds that plaintiff presents mere speculation as to the presence of a public interest favoring a stay of the *vacatur* and, thus, could reject plaintiff's argument on that basis alone.

However, even assuming *arguendo* that there is a public interest in the enforcement of foreign judgments *and* that plaintiff will eventually obtain such a judgment, plaintiff has failed, as discussed *supra*, to establish that it will be unable to collect on any future judgments obtained against WBC KS in this action. Therefore, there is no basis for this Court to find that such an interest would be adversely effected by denying a stay of the *vacatur*.

B. Weighing the Factors

On balance, the above-cited factors weigh against granting a stay of the *vacatur* pending appeal. Although the factor concerning substantial harm to defendant slightly favors a stay, the remaining factors weigh heavily against a stay of the *vacatur*. First, the factor regarding plaintiff's possibility of success on appeal weighs against a stay; that is, plaintiff's possibility of success on appeal, although not insignificant, does not appear to be "substantial." Second, most significantly, the factor concerning irreparable injury overwhelmingly weighs against a stay of the *vacatur*; as discussed *supra*, plaintiff has failed to establish any legally cognizable type of irreparable injury sufficient to justify a stay pending

appeal. Finally, plaintiff has failed to establish any public interest favoring a stay.

C. Plaintiff's Request for a Temporary Stay

The Court grants plaintiff's request for a temporary stay of the *vacatur* so that plaintiff may apply to the Court of Appeals for the Second Circuit for a stay pending appeal, pursuant to *Rule 8(a) of the Federal Rules of Appellate Procedure. See, e.g., In re Albicocco, No. 06-CV-3409 (JFB), 2006 U.S. Dist. LEXIS 65359, 2006 WL 2620464, at *5 (E.D.N.Y. Sept. 13, 2006)* (denying a stay pending appeal under *Rule 62*, but granting a temporary stay so that a party could apply to the Court of Appeals for a stay); *Motorola Credit Corp. v. Uzan, 275 F. Supp. 2d 519, 525 (S.D.N.Y. 2003)* (same); **[**30]** *Paris v. (1) Dep't of Nat'l Store Branch (1) Vietnam, No. 99-CV-8607 (NRB), 2000 U.S. Dist. LEXIS 8331, 2000 WL 777904, at *5 (S.D.N.Y. June 15, 2000)* (same); *LNC Investments, Inc. v. Republic of Nicaragua, No. 96-CV-6360 (JFK) 2000 U.S. Dist. LEXIS 7738, 2000 WL 729216, at *2 (S.D.N.Y. June 6, 2000)* (same). If plaintiff fails to apply to the Court of Appeals by Friday, October 19, 2007, the temporary stay shall expire. However, if plaintiff applies for a stay pending appeal with the Court of Appeals before that deadline, this Court's temporary stay will remain in effect until the stay motion before the Second Circuit is decided.

IV. CONCLUSION

For the foregoing reasons, plaintiff's motion for a stay of the *vacatur* pending appeal is DENIED. Plaintiff's request for a temporary stay of the *vacatur*

pending the Court of Appeals' resolution of a motion to stay is GRANTED.

SO ORDERED.

RICHARD J. SULLIVAN

United States District Judge

Dated: October 12, 2007

New York, NY

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 10th day of July, two thousand and nine,

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Centauri Shipping Ltd.,

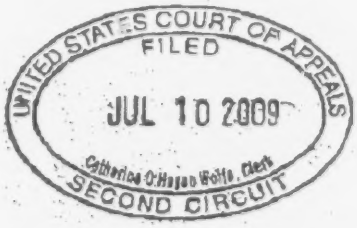
Plaintiff-Appellant,

v.

Western Bulk Carriers KS,
Western Bulk AS,
Western Bulk Carriers AS,

Defendants-Appellees.

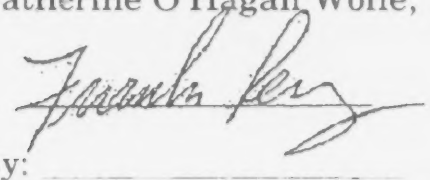
ORDER
Docket Number:
07-4193-cv



Appellant, Centauri Shipping Ltd., having filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*, and the panel that determined the appeal having considered the request for panel rehearing, and the active members of the Court having considered the request for rehearing *en banc*,

IT IS HEREBY ORDERED that the petition is denied.

For the Court:
Catherine O'Hagan Wolfe,
Clerk



By: _____
Frank Perez, Deputy Clerk

LEXSTAT FED. R. SUPP. ADM. MARITIME CLAIMS B

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*** CURRENT THROUGH CHANGES RECEIVED AUGUST 18, 2009 ***

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Rule B. In Personam Actions: Attachment and Garnishment [Caution: For amendments effective December 1, 2009, see prospective amendment note to this rule.]

(1) When Available; Complaint, Affidavit, Judicial Authorization, and Process. In an in personam action:

(a) If a defendant is not found within the district when a verified complaint praying for attachment and the affidavit required by Rule B(1)(b) are filed, a verified complaint may contain a prayer for process to attach the defendant's tangible or intangible personal property--up to the amount sued for--in the hands of garnishees named in the process.

(b) The plaintiff or the plaintiff's attorney must sign and file with the complaint an affidavit stating that, to the affiant's knowledge, or on information and belief, the defendant cannot be found within the district. The court must review the complaint and affidavit and, if the conditions of this Rule B appear to exist, enter an order so stating and authorizing process of attachment and garnishment. The clerk may issue supplemental process enforcing the court's order upon application without further court order.

(c) If the plaintiff or the plaintiff's attorney certifies that exigent circumstances make court review impracticable, the clerk must issue the summons and process of attachment and garnishment. The plaintiff has the burden in any post-attachment hearing under Rule E(4)(f) to show that exigent circumstances existed.

(d) (i) If the property is a vessel or tangible property on board a vessel, the summons, process, and any supplemental process must be delivered to the marshal for service.

(ii) If the property is other tangible or intangible property, the summons, process, and any supplemental process must be delivered to a person or organization authorized to serve it, who may be (A) a marshal; (B) someone under contract with the United States; (C) someone specially appointed by the court for that purpose; or, (D) in an action

brought by the United States, any officer or employee of the United States.

(e) The plaintiff may invoke state-law remedies under Rule 64 for seizure of person or property for the purpose of securing satisfaction of the judgment.

(2) Notice to Defendant. No default judgment may be entered except upon proof--which may be by affidavit--that:

(a) the complaint, summons, and process of attachment or garnishment have been served on the defendant in a manner authorized by Rule 4;

(b) the plaintiff or the garnishee has mailed to the defendant the complaint, summons, and process of attachment or garnishment, using any form of mail requiring a return receipt; or

(c) the plaintiff or the garnishee has tried diligently to give notice of the action to the defendant but could not do so.

(3) Answer.

(a) *By Garnishee.* The garnishee shall serve an answer, together with answers to any interrogatories served with the complaint, within 20 days after service of process upon the garnishee. Interrogatories to the garnishee may be served with the complaint without leave of court. If the garnishee refuses or neglects to answer on oath as to the debts, credits, or effects of the defendant in the garnishee's hands, or any interrogatories concerning such debts, credits, and effects that may be propounded by the plaintiff, the court may award compulsory process against the garnishee. If the garnishee admits any debts, credits, or effects, they shall be held in the garnishee's hands or paid into the registry of the court, and shall be

held in either case subject to the further order of the court.

(b) *By Defendant.* The defendant shall serve an answer within 30 days after process has been executed, whether by attachment of property or service on the garnishee.

LEXSTAT NY CLS BUS CORP § 1304

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*** THIS SECTION IS CURRENT AS OF JUNE 25, 2009 ***
*** THROUGH RELEASED CH. 1 THROUGH 14, 16 THROUGH 49, 52, AND 56 THROUGH 68 ***

BUSINESS CORPORATION LAW
ARTICLE 13. FOREIGN CORPORATIONS

Go to the New York Code Archive Directory

NY CLS Bus Corp § 1304 (2009)

§ 1304. Application for authority; contents

(a) A foreign corporation may apply for authority to do business in this state. An application, entitled "Application for authority of . . .. (name of corporation) under *section 1304 of the Business Corporation Law*", shall be signed and [fig 1] delivered to the department of state. It shall set forth:

(1) The name of the foreign corporation.

(2) The fictitious name the corporation agrees to use in this state pursuant to section 1301 of this chapter, if applicable.

(3) The jurisdiction and date of its incorporation.

(4) [fig 1] The purpose or purposes for which it is formed, it being sufficient to state, either alone or with other purposes, that the purpose of the corporation is to engage in any lawful act or activity for which corporations may be organized under this chapter, provided that it also state that it is not formed to engage in any act or activity requiring the consent or approval of any state official, department, board, agency or other body without such consent or approval first being obtained. By such statement all lawful acts and activities shall be within the purposes of the corporation, except for express limitations therein or in this chapter, if any.

(5) The [fig 1] county within this state in which its office is to be located.

(6) A designation of the secretary of state as its agent upon whom process against it may be served and the post office address within or without this state to which the secretary of state shall mail a copy of any process against it served upon him.

(7) If it is to have a registered agent, his name and address within this state and a statement that the registered agent is to be its agent upon whom process against it may be served.

(8) A statement that the foreign corporation has not since its incorporation or since the date its authority to do business in this state was last surrendered, engaged in any activity in this state, except as set forth in paragraph (b) of section 1301 (Authorization of foreign corporations), or in lieu thereof the consent of the state tax commission to the

filing of the application, which consent shall be attached thereto.

(h) Attached to the application for authority shall be a certificate by an authorized officer of the jurisdiction of its incorporation that the foreign corporation is an existing corporation. If such certificate is in a foreign language, a translation thereof under oath of the translator shall be attached thereto.

LEXSTAT N.Y. C.P.L.R. 301

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CIVIL PRACTICE LAW AND RULES
ARTICLE 3. JURISDICTION AND SERVICE, APPEARANCE AND CHOICE OF COURT

Go to the New York Code Archive Directory

NY CLS CPLR § 301 (2009)

§ 301. Jurisdiction over persons, property or status

A court may exercise such jurisdiction over persons, property, or status as might have been exercised heretofore.

Supreme Court, U.S.
FILED
NOV 20 2009
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No. 09-264

IN THE
Supreme Court of the United States

CENTAURI SHIPPING LTD.,
Petitioner,

v.

WESTERN BULK CARRIERS KS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

PATRICK F. LENNON
LENNON, MURPHY & LENNON, LLC
The GrayBar Building
420 Lexington Ave., Suite 300
New York, NY 10170
(212) 490-6050

Counsel for Respondent

226571

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Is a foreign corporation's registration for authority to conduct business in the State of New York, pursuant to and in conformity with the statutory requirements for doing so, coupled with the appointment of an agent for service of process sufficient to render a foreign corporation "found within the district" for purposes of Rule B(1) of the Supplemental Rules for Admiralty and Maritime Claims and Asset Forfeiture Actions of the Federal Rules of Civil Procedure?

CORPORATE DISCLOSURE STATEMENT

Respondent, Western Bulk Carriers KS, has no parent corporation and no publicly held company owns 10% or more of its stock.

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COUNTER-STATEMENT OF THE CASE

Centauri Shipping Ltd. ("Centauri") commenced this action on June 5, 2007 claiming damages against Western Bulk Carriers KS ("WBC") based on an alleged wrongful arrest[1] of Centauri's vessel in Angola and seeking enforcement under international comity principles of a Judgment issued by the court in Angola. Plaintiff also sought and obtained an Ex Parte Order for issuance of process of maritime attachment and garnishment ("PMAG") pursuant to Rule B of the Supplemental Rules for Admiralty and Maritime Claims and Asset Forfeiture Actions ("Rule B"). *Centauri Shipping Ltd. v. Western Bulk Carriers KS*, 528 F.Supp.2d 186, 187 (S.D.N.Y. 2007). Centauri's counsel filed an affidavit in support of its motion for an ex parte order of maritime attachment and garnishment pursuant to Rule B claiming that WBC could not be found within the Southern District of New York (the "District") and that it could find no records with the New York Secretary of State, Department of Corporations relating to WBC. *Id.* The affidavit filed by Centauri's counsel's was false because it failed to disclose to the district court that WBC was registered to conduct business within the State of New York since 2005 and

[1] WBC disputes Centauri's assertion that WBC "wrongfully arrested" the M/V CENTAURI at Luanda, Angola in March 2005. Pet. 8. WBC also disputes Centauri's assertion that the Supreme Court of the Republic of Angola ruled that WBC had wrongfully arrested the vessel and/or that it ruled that WBC had "acted in bad faith by intentionally filing misleading documents with the lower court when seeking the arrest of Centauri's vessel." *Id.* The Supreme Court of the Republic of Angola made no such findings.

that it had a designated agent for service of process within the District. *Id.* Centauri's counsel admitted this critical misrepresentation of fact upon which the issuance of the June 5, 2007 Ex Parte Order was premised. *Id.* at 188. The district court, not possessing accurate facts regarding WBC's presence in the District, issued the Ex Parte Order on June 5, 2007 in the sum of $15,350,796. *Id.* at 187.

Thereafter, Plaintiff proceeded to serve the PMAG on various garnishee banks within the District. Over the period of the next several days, various electronic funds transfers ("EFTs") being routed through the garnishee banks, both those being paid by and to WBC, were attached. WBC then posted a surety bond as substitute security for the attachment of funds in the hands of the garnishee banks, which the district court approved by order dated June 15, 2007. *Id.*

WBC then moved to vacate the attachment pursuant to Rule E of the Supplemental Rules for Admiralty and Maritime Claims and Asset Forfeiture Actions (hereinafter the "Supplemental Rules"). *Id.* at 187-188. On September 5, 2007, the district court heard oral argument on the Motion to Vacate the Maritime Attachment. *Id.* at 188. On September 7, 2007, the district court issued an oral decision vacating the attachment based upon the fact that WBC was "present" in the District for Rule B purposes at the time Centauri filed its Verified Complaint. *Id.* The district court issued a written Order dated September 12, 2007 vacating the attachment. *Id.*

On September 17, 2007 Centauri filed a notice of appeal of the September 12, 2007 Order. *Id.* In addition, on September 17, 2007, Centauri filed a motion in the district court to stay the *vacatur* decision pending appeal. *Id.* In a Memorandum and Order dated October 12, 2007, the district court denied Centauri's motion for a stay pending appeal, but granted a temporary stay to allow Centauri to seek the same relief from the Second Circuit. *Id.* Centauri then moved for a stay in the Second Circuit which was granted on January 30, 2008.

On April 20, 2009, the Second Circuit issued a Summary Order affirming the district court's September 12, 2007 vacatur Order, following its earlier decision in *STX Panocean (UK) Co., Ltd. v. Glory Wealth Shipping Pte Ltd.*, 560 F.3d 127 (2d Cir. 2009), holding that "registration with the New York Department of State, pursuant to New York Business Corporation Law § 1304, to conduct business in New York and designation of an agent within the district upon whom process may be served constitutes being 'found' within the district for purposes of Rule B. . . ." Pet. App. 2a; *Centauri Shipping Ltd. v. Western Bulk Carriers KS*, 323 Fed.Appx. 36 (2d Cir. 2009). The Second Circuit denied Centauri's motion for rehearing *en banc* by Order dated July 10, 2009.

Centauri's petition to this Court followed on August 28, 2009.

REASONS FOR DENYING THE PETITION

The limited question which this case presents is whether a foreign corporation's registration for authority to conduct business in the State of New York, pursuant to and in conformity with the statutory requirements for doing so, coupled with the appointment of an agent for service of process renders it "found within the district" for purposes of Rule B(1) of the Supplemental Rules for Admiralty and Maritime Claims and Asset Forfeiture Actions. Centauri urges that the question presented is "one of exceptional importance" to the global maritime community. Pet. 6.

Centauri's assertion vastly overstates the importance of the issue, but more importantly, even if this Court were to grant certiorari and reverse the decision below, under the Second Circuit's recent decision in *Shipping Corp. of India v. Jaldhi Overseas Pte Ltd.*, 2009 U.S. App. LEXIS 22747 (2d Cir. Oct. 16, 2009) the Rule B Ex Parte Order issued in the district court would nevertheless be subject to vacatur. In *Jaldhi*, employing a "mini en banc procedure,"[2] the Second Circuit overruled its recent prior decisions in *Winter Storm Shipping Ltd. v. TPI*, 310 F.3d 263 (2d Cir. 2002), *cert. denied* 539 U.S. 927 (2003); and *Consub Delaware LLC v. Schahin Engenharia Limitada*, 543

[2] Acknowledging that a panel of the court is "'bound by the decisions of prior panels until such time as they are overruled either by an *en banc* panel of our Court or by the Supreme Court,' *United States v. Wilkerson*, 361 F.3d 717, 732 (2d Cir. 2004)" the *Jaldhi* court nevertheless overruled these cases without conducting an en banc hearing. *Jaldhi*, 2009 U.S. App. LEXIS 22747 at *23.

F.3d 104, 109 (2d Cir. 2008), and held that "[b]ecause EFTs in the temporary possession of an intermediary bank are not property of either the originator or the beneficiary under New York law, they cannot be subject to attachment under Rule B." *Jaldhi*, 2009 U.S. App. LEXIS 22747 at *35. No point would be served for this Court to grant review on Centauri's "found within the district" issue (irrespective of its cert-worthiness), only to have the attachment vacated on *Jaldhi*'s threshold ground of applicability to EFTs. In short, Centauri's petition is a sub-optimal vehicle for the issue it ostensibly presents.

The Second Circuit's decision below is, moreover, limited to Rule B cases filed in New York. Whether a foreign corporation that registers to conduct business in the State of New York can be "found" in New York for Rule B purposes is an issue that by its very nature can neither conflict with nor affect the law in any other circuit. Moreover, the Second Circuit's determination that a defendant is "found" within the district for Rule B purposes when it is registered to conduct business in the State of New York prior to the filing of the verified complaint does not fly "in the face of prior decisions of this Court recognizing the importance of maritime attachment and its vital historical purposes" as Centauri strains to contend.[3] Pet. 20. The Second Circuit's decision does no such thing because it does not in any way place any general limitations on the utility of Rule B. Rather, the decision below simply clarifies that a

[3] Later in its Petition, Centauri candidly admits that the Second Circuit's decision does not actually conflict with any of this Court's prior holdings. Pet. 26-27.

certain class of defendants otherwise subject to the general jurisdiction of New York courts can be "found" within the district for Rule B purposes.

I.

THE DECISION DOES NOT INVOLVE ANY IMPORTANT FEDERAL-STATE "INTERPLAY" CONCERNS

Centauri criticizes the Second Circuit for looking to New York state law to determine the effect of WBC's registration to conduct business in the State of New York on the question of whether it can be "found" for Rule B purposes. Neither Rule B nor any other federal rule or statute provide a direct answer to that question. But that is not a prudential ground to grant review here. The relevant precedents hold that in the absence of an established federal rule, federal courts should look to state law in order to fashion a federal rule. *West v. Conrail*, 481 U.S. 35, 39-40 & n.6 (1987) (with the caveat that "we borrow [from state law] no more than necessary" "to fill the gap left by Congress"). Such is entirely consistent in the maritime context. *See, e.g., Madruga v. Superior Court of State of Cal.*, 346 U.S. 556, 561 (1954) ("a state, 'having concurrent jurisdiction, is free to adopt such [in personam] remedies, and to attach to them such incidents, as it sees fit' so long as it does not attempt to make changes in the 'substantive maritime law'." (quoting *Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 109, 124 (1924)). This is precisely what the Second Circuit did in this case. Therefore, Centauri is incorrect in its contention that the Second Circuit improperly analyzed the underlying question presented here.

II.

THE DECISION DOES NOT AFFECT UNIFORMITY OF MARITIME LAW

Centauri contends that Second Circuit's decision disrupts uniformity of maritime law. Without identifying the issue specifically, Petitioner turns federal preemption analysis on its head by urging a misapplication of maritime law's uniformity principle, which derives from admiralty preemption cases.

The uniformity issue typically arises, as it did in *American Dredging Co. v. Miller*, 510 U.S. 443, 447 (1994), when application of various state laws would lead to divergent substantive results in cases decided under federal admiralty jurisdiction. But in *American Dredging*, this Court held that a state statute affecting the application of a *forum non conveniens* defense did not so appreciably affect substantive (as distinct from procedural) maritime remedies as to be pre-empted. *See id.* at 453.

What Centauri appears to be urging is the uniform rejection of the foreign corporation registration statutes of all fifty states. Yet, in order for state law to be preempted under this Court's decision in *Southern Pac. Co. v. Jensen*, 244 U.S. 204, 216 (1917), it must be first determined to work a material prejudice to a characteristic feature of the maritime law. Centauri fails to explain how application of the New York registration statute to the fact-based determination of whether a defendant can be "found" in the district for Rule B purposes works a substantive and material prejudice to the vitality of Rule B attachments.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

PATRICK F. LENNON
LENNON, MURPHY & LENNON, LLC
The GrayBar Building
420 Lexington Ave., Suite 300
New York, NY 10170
(212) 490-6050

Counsel for Respondent

Supreme Court, U.S.
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No. 09-264

IN THE

Supreme Court of the United States

CENTAURI SHIPPING LTD.,
Petitioner,

v.

WESTERN BULK CARRIERS KS, WESTERN BULK AS, AND WESTERN BULK CARRIERS AS,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR THE PETITIONER

KIRK M. LYONS *
LYONS & FLOOD LLP
65 West 36th Street
7th Floor
New York, NY 10018
(212) 594-2400

RAYMOND G. MULLADY, JR.
ORRICK, HERRINGTON & SUTCLIFFE LLP
Columbia Center
1152 15th Street, N.W.
Washington, D.C. 20005
(202) 339-8400

Counsel for Petitioner Centauri Shipping Ltd.

November 30, 2009

* *Counsel of Record*

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, petitioner states as follows:

Centauri Shipping Ltd. is not a publicly held corporation in the United States and there are no corporate parents, subsidiaries, or affiliates of Centauri Shipping Ltd. which are otherwise publicly held in the United States.

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REPLY BRIEF FOR THE PETITIONER

Respondent WBC's principal attack on the petition is its assertion that Centauri "vastly overstates the importance" of the issues presented, suggesting that the effects of the Second Circuit's decision below will be limited to New York and that a recent decision by the Second Circuit in *Shipping Corp. of India v. Jaldhi Overseas PTE Ltd.*, 2009 U.S. App. LEXIS 22747 (2d Cir. Oct. 16, 2009), somehow renders it pointless for the Court to grant review. (Opp. 4-5).

WBC's arguments, however, do not undermine Centauri's showing that the case is worthy of the Court's review. If anything, they provide further support for the need for guidance from the Court to ensure the preservation of the remedy of maritime attachment.

First, as Centauri has emphasized in its petition, the Second Circuit plays a uniquely prominent role when it makes judicial determinations regarding Rule B attachments, due to its historical role as a major maritime port and its present prominence as a world financial capital. Decisions issued by the Second Circuit addressing Rule B are therefore routinely followed by Federal courts, making the Second Circuit tantamount to a 'Federal Circuit' for maritime attachments. (Pet. 18-19; 25-26).

Thus, contrary to WBC's suggestion, the repercussions of the Second Circuit's decision below will be felt nationally, and will not merely be constrained and cabined to New York.

Second, WBC's assertion that the Second Circuit's recent *Jaldhi* decision vitiates or moots the need for

the Court to grant review is groundless. The *Jaldhi* decision, while deeply troubling (as discussed in Part III below), is not directly applicable to this case, because the *res* under attachment here is a surety bond issued by Travelers Casualty and Surety Company of America and posted by WBC, not electronic funds transfers in the temporary possession of an intermediary bank with which the *Jaldhi* decision was solely concerned. *Jaldhi*, 2009 U.S. App. LEXIS 22747, at *35.[1] The *Jaldhi* decision does, however, elevate the importance of Centauri's petition in that the decision continues the trend of permitting state law to supplant and interfere with the uniformity of federal maritime law in the context of maritime attachments.

I. THE APPLICATION OF STATE LAW OVER FEDERAL MARITIME LAW BY THE LOWER COURT JUSTIFIES REVIEW OF THIS CASE

WBC attempts to justify and rationalize the Second Circuit's decision below to apply New York

---

[1] The fact that there may exist a potential alternative basis on which a lower court might have relied in reaching the decision appealed from does not justify denial of review. *See Lawrence v. Chater*, 516 U.S. 163, 170 (1996) ("it is important that the meaningful exercise of this Court's appellate powers not be precluded by uncertainty as to what the [lower] court below might have relied on") (emphasis in original) (internal citations omitted).

state law to the issue of a defendant's "presence" in the context of Rule B, by noting that in the absence of federal maritime law as to the meaning of the presence requirement it was proper for the Second Circuit to look to state law. (Opp. 6). However, this argument is based on a faulty premise and thus, should be rejected.

It is true that Rule B itself does not define "found within the district," since the drafters deemed the definition of the clause "best left for the time being to development on a case-by-case basis." *See* Notes of Advisory Committee to 1966 adoption of Rule B: Note to Subdivision (1).

The drafters of the modern incarnation of Rule B, however, also stated that their intent was to preserve "the traditional maritime remedy of attachment and garnishment, and [carry] forward the relevant substance of Admiralty Rule 2" and that the modern rule "follows closely the language of Admiralty Rule 2" with no intention to change "the condition that makes the remedy available." *Id.*

Further, the Advisory Committee explained that it had considered whether the rule should be changed to permit attachment only when the defendant could not be found within a state rather than merely in a particular district within a state, and "concluded that the remedy should not be so limited." *Id.* The Advisory Committee noted that the effect of this decision was to permit attachment even in cases where jurisdiction over the defendant may be

independently obtained, such as where "a corporate defendant has appointed an agent within the district to accept service of process but is not carrying on activities there sufficient to subject it to jurisdiction" or where "the foreign corporation's activities in the district are sufficient to subject it personally to the jurisdiction, [but] there is in the district no officer on whom process can be served." *Id.*

This consideration as to whether the rule should be altered was "brought about by Rule 4(f), which will enable summons to be served throughout the state instead of, as heretofore, only within the district." *Id.* The advent of then Rule 4(f) (now Rule 4(k)) would have created a situation where the presence of a defendant in one district within a state would automatically render that defendant present in every district within the state. *See, e.g., Amber Int'l Navigation, Inc. v. Repinter Int'l Shipping Co., S.A.*, 2009 U.S. Dist. LEXIS 55779 (S.D.N.Y. June 29, 2009).

Thus, it is clear that the drafters of Rule B contemplated that the "presence" of a defendant so as to avoid a maritime attachment must require sufficient activity within a particular district – not merely within a state as a whole. They further rejected the notion that jurisdiction obtained through statewide service of process supplanted any need for maritime attachment or that such "presence" would have curtailed the availability of maritime attachment under the traditional form of the rule.

The Second Circuit, in its application of New York's corporate registration statute and case law, thus violated the intention of the drafters of Rule B. In no way could the drafters of Rule B have intended the result the Second Circuit reached, which defies the historical purposes and operation of the remedy of maritime attachment.

This overriding of federal maritime law in favor of state law is particularly pernicious given Rule B's unique status as being solely authored by this Court since 1844. *See, e.g., Schiffahartsgesellschaft Leonhardt & Co. v. A. Bottacchi S.A. de Navegacion*, 732 F.2d 1543, 1549 (11th Cir. 1984) (noting that this "lineage sets [Rule B] apart from common law based sequestration, garnishment, and attachment laws developed by the legislatures of the several states.")

As the sole author of Rule B, and thus, the ultimate proponent of its requirements, this Court should provide guidance as to the meaning and application of the Rule so as to ensure its continued vitality and availability to maritime claimants.

II. THE LOWER COURT'S DECISION IMPAIRS THE UNIFORMITY OF FEDERAL MARITIME LAW

WBC mischaracterizes Centauri's position by suggesting that Centauri is urging "the uniform rejection of the foreign corporation registration statutes of all fifty states." (Opp. 7). This is clearly not the case.

The problem raised by the decision below is not caused by the registration statutes themselves, but rather by the interplay of corporate registration statutes such as New York's with the extension of personal jurisdiction over foreign corporations through such registration statutes. (Pet. 20-21).

While such an extension of personal jurisdiction may be permissible ordinarily (*see* Pet. 16 n.4), different principles must apply in the context of maritime attachments. This is evidenced by the fact that this Court's ruling in *Shaffer v. Heitner*, 433 U.S. 186 (1977), that *quasi in rem* jurisdiction must satisfy the same due process requirements set with respect to in personam jurisdiction in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945) and its progeny, has almost universally been held not to apply to maritime attachment actions.

For example, in *Amoco Overseas Oil Co. v. Compagnie Nationale Algerienne de Navigation*, 605 F.2d 648 (2d Cir. 1979), the Second Circuit discussed the applicability of *Shaffer* to maritime attachments, noting that even if it were to apply, "that application must be understood in the light of the special history and circumstances of that unique body of law" since:

> ... the perpetrators of maritime injury are likely to be peripatetic, and since the constitutional power of the federal courts is separately derived in admiralty, U.S. Constitution Art. III § 2, suits under admiralty jurisdiction

> involve separate policies to some extent. This tradition suggests not only that jurisdiction by attachment of property should be accorded special deference in the admiralty context, but also that maritime actors must reasonably expect to be sued where their property may be found.

Amoco, 605 F.2d 655 and n.7 (internal citation omitted). *See also*, *Schiffahartsgesellschaft Leonhardt & Co. v. A. Bottacchi S.A. de Navegacion*, 732 F.2d 1543 (11th Cir. 1984); *Trans-Asiatic Oil, Ltd. S.A. v. Apex Oil Co.*, 743 F.2d 956 (1st Cir. 1984); *Polar Shipping Ltd. v. Oriental Shipping Corp.*, 680 F.2d 627 (9th Cir. 1982); *Submersible Sys. v. Perforadora Central, S.A. de C.V.*, 249 F.3d 413, 419 n.2 (5th Cir. 2001); George Rutherglen, *ARTICLE: The Federal Rules for Admiralty and Maritime Cases: A Verdict of Quiescent Years*, 27 J. MAR. L. & COM. 581, 603-04 (October 1996) (noting that "Rule B, in particular, survives in formal defiance of *Shaffer v. Heitner*" since "[i]t does precisely what *Shaffer* forbids, precisely for the reasons that *Shaffer* forbids it ... [allowing] attachment of the vessel for the purpose of forcing the defendant to come into the jurisdiction and submit to personal jurisdiction and [doing] so by relying on the traditional fictions that the court's power extends to the person of the defendant to the extent of his property within its reach.")

Moreover, this situation is analogous to the dilemma faced by the Court in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), where it rejected the long settled view that a state could satisfy the "substantial nexus" requirement of the Commerce Clause to collect a tax from an out-of-state corporation based on the minimum contacts test used to establish jurisdiction under the Due Process Clause. The Court explained that the "substantial nexus" requirement is not, like due process' "minimum contacts" requirement, a proxy for notice, but rather a means for limiting state burdens on interstate commerce. *Quill*, 504 U.S. at 313. Thus, the Commerce Clause requires a more stringent showing of "physical presence" to establish a nexus between the state and the foreign corporation. *Id.*

Similarly, for a defendant to be "present" within the meaning of Rule B, a more stringent showing of actual presence is required rather than the mere minimum contacts required in a personal jurisdiction analysis. Therefore, as in *Quill*, state law must be rejected to the extent that it seeks to supplant the more stringent requirements.

Thus, contrary to WBC's argument, Centauri has sufficiently demonstrated a basis for pre-emption of state law. Pre-emption obtains not only because of the separate constitutional source of admiralty jurisdiction, but also because the assertion of personal jurisdiction over a defendant through application of New York's corporate registration statute prevents the attachment of a defendant's

property within a district despite the defendant's lack of an actual presence in the district. (Pet. 33). State law must yield where, as here, it works a substantive and material prejudice to the vitality of Rule B attachments and the substantive rights of maritime claimants.

II. THE LOWER COURT'S *JALDHI* DECISION ELEVATES THE IMPORTANCE OF CENTAURI'S PETITION

An examination of the *Jaldhi* decision and the context in which it was issued elevates the importance of Centauri's petition.

In 2002, the Second Circuit issued its decision in *Winter Storm Shipping, Ltd. v. TPI*, 310 F.3d 263 (2d Cir. 2002), *cert. denied*, 539 U.S. 927 (2003), establishing for the first time that electronic funds transfers in the hands of intermediary banks could be property subject to maritime attachment.

The principal issue faced by the Second Circuit in *Winter Storm* was whether New York state law or federal maritime law should govern the issue of whether a defendant had an attachable property interest in a particular *res*. Focusing on the historical importance of maritime attachment and the need for uniformity in its application, the Second Circuit held that state law (and in particular N.Y. U.C.C. § 4A-503) was pre-empted by federal maritime law. *Winter Storm*, 310 F.3d at 279. In 2003, this Court declined to review the *Winter Storm* decision.

However, in 2006, in a footnote to *Aqua Stoli Shipping Ltd. v. Gardner Smith Pty Ltd.*, 460 F.3d 434 (2d Cir. 2006), the Second Circuit invited challenges to its holding in *Winter Storm*, commenting that "the correctness of our decision in *Winter Storm* seems open to question." *Aqua Stoli*, 460 F.3d at 446 n.6.

Until the recent *Jaldhi* decision those challenges were roundly rejected. In September of 2008, the Second Circuit issued its decision in *Consub Delaware LLC v. Schahin Engenharia Limitada*, 543 F.3d 104 (2d Cir. 2008), reaffirming *Winter Storm* as having been "correctly decided" and trumpeting that its holding "ought to jettison any speculation that this note in *Aqua Stoli* foretold the demise of *Winter Storm*." *Consub Delaware*, 543 F.3d at 109. Moreover, the Second Circuit explained that if any change in the practice was counseled, the recourse lay in the hands of Congress since "admiralty jurisdiction is the subject of congressional legislation and Congress remains free to alter the *Winter Storm* rule." *Id.*

By March of 2009, however, a shift began to take place as evidenced by the Second Circuit's decision in *STX Panocean Co. v. Glory Wealth Shipping Pte Ltd.*, 560 F.3d 127 (2d Cir. 2009), upon which the decision below solely relied. In *STX Panocean*, the Second Circuit held that New York state law rather than federal maritime law should govern the issue of whether a defendant was "present" in a District for the purposes of Rule B. *STX Panocean*, 560 F.3d at

131.

This trend of permitting state law to supplant federal maritime law in the context of maritime attachments continued with the issuance on October 16, 2009, of the *Jaldhi* decision, where without holding an *en banc* hearing, as is customary, a panel of the Second Circuit announced the reversal of *Winter Storm* and *Consub Delaware*, characterizing those decisions as having been wrongly decided. This unexpected development was the result of a *sua sponte* review of these prior holdings, since none of the litigants in *Jaldhi* had raised the issue of whether *Winter Storm* or *Consub Delaware* were correctly decided.

In an unusual preface to its analysis, the *Jaldhi* panel attempted to provide a justification for its sudden reversal from recent precedent, noting that "[v]arious commentators and courts have suggested that *Winter Storm* directly led to strains on federal courts and international banks operating within our Circuit ... [a]nd some have even suggested that *Winter Storm* has threatened the usefulness of the dollar in international transactions." *Jaldhi*, 2009 U.S. App. LEXIS 22747, at *7 (internal citations omitted).

Thus, the *Jaldhi* panel admitted that its decision was motivated out of concern that "[u]ndermining the efficiency and certainty of fund transfers in New York could, if left uncorrected, discourage dollar-denominated transactions and damage New York's

standing as an international financial center" and was further part of a larger "trend toward limiting maritime attachments of EFTs in our Circuit" as exemplified by *STX Panocean*. *Jaldhi*, 2009 U.S. App. LEXIS 22747, at **10 and 15.

Therefore, the Second Circuit's recent ruling in *Jaldhi* is not an obstacle to review: it is a further reason to grant review. The *Jaldhi* decision is highly unusual and troubling, not only because of its further evisceration of the traditional remedy of maritime attachment, but also because of its intrusion on Congressional authority and candid admission that the outcome was motivated by policy considerations and legislative ambitions.

Post-*Jaldhi*, it is clear that there is an emerging trend in the Second Circuit of denying maritime claimants access to Rule B through the impermissible application of state law over federal maritime law. Absent review by this Court, this trend will remain unchecked to the detriment of maritime claimants world-wide.

CONCLUSION

For all of the foregoing reasons and for those set forth before, the petition for a writ of certiorari should be granted.

Respectfully submitted,

KIRK M. LYONS *
LYONS & FLOOD LLP
65 West 36th Street
7th Floor
New York, NY 10018
(212) 594-2400

RAYMOND G. MULLADY, JR.
ORRICK, HERRINGTON &
SUTCLIFFE LLP
Columbia Center
1152 15th Street, N.W.
Washington, D.C. 20005
(202) 339-8400

Counsel for Petitioner Centauri Shipping Ltd.

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* *Counsel of Record*